No. 2904

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

R. A. GRAHAM,

Appellant,

vs.

THE J. D. SPRECKELS & BROTHERS COMPANY (a corporation) and the SOUTHERN PACIFIC COMPANY (a corporation),

Appellees.

BRIEF FOR APPELLEES.

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Statement.

On June 8th, 1899, and after negotiations conducted between competent and informed lawyers, representing both sides,—and with the express and avowed purpose on both sides to make an end of all differences,—a final settlement of all matters of difference was signed, witnessed, and delivered. Upon the face and front of the settlement itself, in its opening words, the parties declare:

> "That the parties hereto, *for the purpose of completely adjusting all matters of difference between themselves,* and between *each* of them, *and* the *Beaver Hill Gold Company,* a corporation, and the *Coos Bay, Roseburg, and Eastern Railroad and Navigation Company,* do hereby agree as follows:"

The transactions of the parties, in the large, had reference to a railroad and a coal mine—a railroad of some 25 or 30 miles, between Marshfield and Myrtle Point, in Coos Bay County, Oregon; a coal mine, the Beaver Hill Coal Mine, in the same locality. The present suit, brought to trial nearly twenty years after, is an audacious and speculative attempt by Graham to rip up that settlement.

This case has been, to the Spreckels Company, a revealing instance of the ancient folly of throwing good money after bad. The Spreckels Company did not become involved in this railroad, or in this coal mine, as a matter of first choice and original investment. Their troubles began in a relatively smaller way, in selling Graham some rails that he was not able to pay for, $30,000. or $40,000. worth of rails. The assertion that Graham had put a fortune into this railroad,—$200,000. in land, and something like the same amount in money,—is preposterous. Mr. Merchant, of Marshfield, gave the land as a subsidy,—Graham admits this (Record, p. 389); it had a value of some $20,000. or $25,000., at this time (pp. 565-6); and at the time it was taken over by the Southern Pacific Company in 1906, a value of about $47,000. (pp. 636-7). As to money, Graham had none (p. 537). "He was not able to pay anything; had no money, in fact; we advanced all the money for the building of the road" (testimony of John D. Spreckels, p. 537).

Neither the road nor the mine was a success. The advances by the Spreckels Company for the railroad, up to the time when they sued Graham on his note

for those advances, had gone beyond half a million dollars.

At the time of the settlement in 1899, the advances to the coal mine were something over $600,000.00. Mr. J. D. Spreckels gives the story in a few words (pp. 537-8):

> "I think I was down at San Diego when Mr. Graham came to me, and wanted to know whether we would import for him or sell him rails for building a railroad in Coos Bay County, from Marshfield to Myrtle Point. I said, 'What is the situation?' He said he had a judgment against the City of San Diego for some grading that he had done, amounting to $30,000. I thought that would be a safe proposition, as the rails he would require would not amount to more than about $30,000. or $40,000. I thereupon wrote to Mr. Samuels asking him to give me a quotation upon the rails, which he did. I think then I turned Mr. Graham over to Mr. Samuels. The work proceeded, and we advanced the money. He was not able to pay anything; had no money, in fact; we advanced all the money for the building of the road. Afterwards it transpired that the road would not be profitable. I think it was Mr. Graham who stated that there were some coal lands that could be had, and which, when operated, would supply freight for the railroad, and thereby make it pay; and that failed. In an attempt to save what money we had into it, we went into that scheme, thinking eventually it might come out all right. It went from bad to worse. The mine was, according to reports I had received from time to time, badly handled, and handled by one who apparently did not know how to handle a coal mine. I think in 1899 I made an affidavit touching on the question as to how much money I advanced on the coal mine proposition. At that time all these things were set out when everything was clear in my mind. The affidavit mentions the amount as $676,146.37, and it is a fact."

It became necessary to remove Graham as manager of the coal property, and put Mr. Chandler in his place. Mr. Fred Samuels, secretary of the Spreckels Company, testified (pp. 585-7):

> "The circumstances under which Graham ceased to be manager of that coal property and how Chandler came up there were that we had six hundred and fifty thousand dollars in there, the amount of coal that was coming out of the mine was simply absurd in quantity, and what was coming was dirt; not only was the coal getting unsalable down there, getting black-eyed, but we had just built bunkers down there costing twenty-one thousand dollars or thereabouts; the coal was getting a bad reputation, and I thought we had gone far enough. I had a meeting with Mr. Graham. I told him this thing was getting to such a point that we simply had to stop, and told him we had better get an engineer up there. I said: 'You are not a mining engineer, and we don't know who these men are that you have employed under you.' The result was that I got Mr. Chandler, after inquiring around San Francisco, to come up to look at the mine and come back and report to me what he thought about it. My recollection is that he came back and reported verbally that the mine was in such a bad condition—at that time there was only one mine, as I understand it No. 1. The expression 'The Beaver Hill Coal Mine' really stands for two mines, No. 1 and No. 2. As I understand No. 1 was the one that Mr. Graham opened; afterwards we called the one Mr. Chandler worked No. 2. No. 1 was the mine that was shut down and No. 2 is the mine that Chandler continued to operate through the years. Mr. Chandler came down, and his report was so unfavorable, it just confirmed my fears, that the Beaver Hill proposition was gone unless we did something strenuous about it, such as appointing new management and opening up more coal, if it was possible to do so; for that purpose he was sent up there, to find out whether anything could be done with the property. He came back and said No. 1 mine, the mine that was there then, was practically worthless. I think

he told me that there could be more than about six or seven thousand tons recovered, but by robbing pillars and doing things of that kind, we might get a little more. I would not be positive about that. He made a written report. This is just the substance of what he said. I then told Graham I was going to send Mr. Chandler up. The first time Mr. Chandler went up Mr. Graham expected him. I presume Mr. Chandler went up the second time under my instruction; probably to get a further report under conditions I wanted to be sure about before making any change as manager. After Mr. Chandler came back the second time he told me about this bribe. I didn't pay much attention to that. In view of the fact of the enormous loss, as I considered it, that the whole property practically was worthless, you see, it seemed to me at that time, the thought of the bribe didn't cut much figure with me, or didn't influence me in any way. And furthermore, I was a little suspicious of Graham at that time, and believed it might be possible that he could have done it. In the meantime I had seen Mr. Graham and said: 'Now, Mr. Graham, we have inquired all about Chandler, and we are going to make a change, and it is to your interest just as well as it is to ours, that there should be a change. You are only in this railroad, you have everything at stake up here, and if we are willing to put up more money to try to pull this thing out, surely you ought to be perfectly willing to help us.' He didn't like the idea of being put out as manager. That conversation was some time in November or December, 1897. Mr. Graham said that was all right. He would be perfectly satisfied, 'and go ahead and do what you like about it'—words to that effect; in other words, led me to believe he was perfectly willing that we should put somebody else in there who probably would do better than he could. I suppose my arguments with him at that time, that his interests were at stake just like ours, were potent, and he was perfectly willing to do it. The sequence of events will appear in the books and minutes of the Beaver Hill Coal Company, of which I was secretary at that time. I think it was in December

that we appointed Mr. Chandler manager, and simultaneously removed Mr. Graham as manager."

Mr. Chandler, for the last eight years president of the First National Bank of Marshfield, was the man selected by the company to examine and report on the condition of the mining property under the Graham management. Mr. Chandler, at this time, had been manager of coal mines, with twelve years of experience in the State of Washington and in British Columbia, holding a professional certificate from the Board of Mining Engineers of British Columbia, and serving as an Examiner with the Board for a number of years. On his first visit to the Beaver Hill property, he found the mine in a dilapidated condition, and the underground workings on the west side of the slope practically ruined. A "gob fire" had broken out close to the bottom of the slope, and had not been controlled. There was no available coal except the matter of about six thousand tons, the pillars of the roof were in bad condition throughout, many of them had been withdrawn where they should not have been, it was a case of "robbing the pillars", and the workings in general were of no value at all (pp. 560-562). Mr. Chandler made a detailed report in writing. It appears in his affidavit, part of this record on appeal, and that affidavit "is a correct report of the condition I found there". Graham attempted to bribe him to report favorably to the company on the condition of the mine, and to recommend the purchase of additional properties on which Graham had taken options to himself (p. 562). On taking charge as manager,

Mr. Chandler "got out most of the 6000 tons of coal, and then, when that was taken out, there wasn't anything further left to get but the rails, pumps, and mining appurtenances" (p. 563). Graham, however, was in control of the railroad company, and, concurrently with Chandler's going in as manager, Graham, through his man in charge, J. B. Hassett, doubled the freight rates for hauling coal, and raised the storage charges (pp. 563-4). After two months, Chandler shut down this mine (p. 564). As pointed out in the testimony of Mr. Samuels, No. 1 was the mine that Mr. Chandler shut down. It was Chandler who handled and operated, and continued to operate, No. 2 mine.

But there is something more than mismanagement of the property into which the Spreckels Company was putting its money. Graham had been suspected, as Mr. Samuels testified, of defrauding the company out of moneys for which he had been making requisition. An expert accountant, Mr. W. H. Hamilton, who is now a member of the bar, and Mr. Frank H. Powers, of the law firm of Heller & Powers, were sent up to the mine to investigate the books and papers, and with the result, as Hamilton's report shows, that Graham had been guilty of frauds and embezzlements.

This report of Mr. Hamilton is set forth in his affidavit, which is part of the record (pp. 632, 633, 634, 634 ad. fin.). He arrived in Marshfield, as the affidavit shows, on January 5th, 1898, in company with Mr. Powers. He found Chandler, the new manager, in possession of the coal property, but all the

books, accounts, papers and correspondence of the Beaver Hill Coal Company were in the possession of Graham's man Hassett, in the office of the Coos Bay, Roseburg and Eastern Railroad Company. Chandler, Hamilton and Powers demanded the books and papers, accounts and correspondence, but Hassett refused to surrender them, and declined to let them go out of his custody until he had completed his accounts up to December 31st, 1897. Hamilton was given access to the books, but to none of the correspondence. Hassett told him that he had sent the correspondence out of the State to Graham, at that time in New York, and Hamilton never saw any of the correspondence.

From January 5th, to March 9th, 1898, Hamilton was engaged in examining the books and vouchers: "It appeared", he says, "from an inspection of said books, that R. A. Graham was indebted to the Beaver Hill Coal Company for moneys taken by him from the funds of said corporation". He tells of certain entries made by Hassett "to prevent a disclosure of such indebtedness". From a petty cash book kept by Hassett, it appeared that Graham had taken in cash, from time to time, moneys of the coal company to the amount of $3000., and that Hassett, afterwards, made an entry in the cash book of the coal company, crediting the company, and charging Graham with $3000. as "cash loaned to R. A. Graham".

The books of the coal company also showed that Graham had taken for his own use another sum of $30,000., of the funds of that company. To conceal

this conversion, Hassett made an entry in the books, crediting Graham with $30,000., for six million feet of logs, at that time in a boom, or subsequently placed there, by the direction and connivance of Hassett. This entry was ante-dated by Hassett more than two months, and was not made in the ordinary course of business, but for the sole purpose of concealing Graham's misappropriation of the coal company's funds. These logs were the property of the coal company. Graham, in 1897, had received from the Spreckels Company $11,485.15 to pay laborers who had been engaged in logging for the Beaver Hill Coal Company. There were no credits on the books of the coal company for any sales of any of these logs, and there were no other logs in the possession of either Graham or the coal company except the logs which Hassett had entered as a pretended consideration for the $30,000. Moreover, Hamilton was informed that Graham sold the logs and got the money, but there was no entry of any such transaction in the books of the coal company.

There were other evidences of Graham's indebtedness to the coal company for stores and supplies belonging to that company and diverted by Graham to his own use. Hassett produced a promissory note signed by Graham to the coal company, for $11,800., which the manager, Chandler, acting under the advice of Mr. Powers, refused to accept.

The books also showed that the coal company's account with the Bank of Roseburg represented a credit of $1486.14 on December 31st. But the statement made by the bank showed that on January 18th,

1898, Graham had deposited to the credit of the coal company $27,560.71, and that on December 31st, 1897, the coal company was overdrawn at the bank in some $28,000., notwithstanding that the account as kept at Marshfield showed a credit balance of $1486.14.

> "The examination of the books and vouchers by me," Mr. Hamilton reports, "diselosed false and fraudulent entries made by the connivance, direction and instruction of J. B. Hassett, whereby large sums of money belonging to the Beaver Hill Coal Company, the corporation defendant, had been diverted to R. A. Graham, and had been by said R. A. Graham appropriated to his own use."

The result of Mr. Hamilton's examination established an indebtedness of Graham for misappropriated funds of the Beaver Hill Coal Company, in excess of $70,000.

Mr. Hamilton further reported:

> "The books of account kept by said Hassett for the Beaver Hill Coal Company, under the direction of said Graham, plaintiff, as manager of Beaver Hill Coal Company, were improperly and irregularly kept. Ledger accounts were opened which were incomplete in form and substance, and it became necessary to refer to vouchers and bills and papers outside of the books, to attempt to follow or trace many transactions of which no information could be obtained from the books themselves. False and improper entries frequently appeared in the ledger accounts. It was the custom of said Hassett and said R. A. Graham, manager, to use the funds of Beaver Hill Coal Company and the Coos Bay, Roseburg and Eastern Railroad and Navigation Company, and their own funds indifferently, there being no segregation thereof; but all funds in the bank at Marshfield were kept in the name of J. B. Hassett, and were distinguished as J. B. Hassett No. 1, and J. B. Hassett No. 2, and J. B. Hassett No. 3; and the bank at Marshfield refused to recognize any account whatever with the Beaver Hill

> Coal Company, or that it held any funds of such company."

Mr. Powers testified to his visit to Marshfield in company with Mr. Hamilton. He tells of an interview that he had with Hassett, "asking for explanation concerning certain items that seemed improper and unfair" (p. 624). He states that one of these

> "was the matter of six million feet of logs; the other was a matter of taking down certain money for the purpose of paying life insurance, and another was for drawing down one thousand dollars to pay Myrick & Deering apparently for services to be performed for Mr. Graham in order to antagonize the work that I was then doing; another was an attempt to have us accept a note of Mr. Graham in place of cash, that apparently should have been shown, a note of somewhere in the neighborhood of $11,000.; also that Mr. Hassett was charging Mr. Hassett's salary, half to Graham and half to the Beaver Hill Coal Company; I couldn't see where he performed any services for Beaver Hill Coal Company, and asked for an explanation of it: and in that explanation Hassett made such statements as appeared to me to make it impossible for him to be a fair receiver" (pp. 624-5).

Mr. Powers tells of the credit that Hassett was asking for, in $30,000., as to the logs. From the figures given to Mr. Powers, these logs had cost in the neighborhood of $2. or $2.50, and were apparently being disposed of for Graham individually, at a profit to Graham of two or three dollars a thousand. "I objected to the item of $30,000., and he tried to explain that to me, but couldn't" (p. 625). Mr. Powers further tells of a discrepancy of some five or six hundred thousand feet of logs. Hassett said the logs had been

shipped to one of the Spreckels companies at San Diego; there was a controversy as to whether the logs belonged to Graham or to him. But Mr. Powers says that, from what the experts had given, there was apparently a shortage of 600,000 feet. Mr. Powers tells, also, of Hassett's withholding moneys to pay a premium on life insurance, when the premium had not come due; and of another item of $4000., also for future money to be paid.

> "The idea of taking cash out of the Beaver Hill Coal Company, and accepting Mr. Graham's note, in order to anticipate certain future payments, was impossible for me to understand, and I refused to accept it otherwise than it was an improper action on the part of Mr. Hassett, and indicated that Mr. Hassett was not a man of the frame of mind who could act as a receiver" (p. 626).

In the affidavit made by Mr. Powers in the receivership proceeding for the ousting of Hassett, the details are more fully stated, and Mr. Powers testified at the trial that the facts in such affidavit were true as he understood and expressed them (p. 626). He goes into detail as to the $30,000., charged for logs. He says:

> "This cash book and the vouchers were none of them entered at the dates of the transactions and the assistant bookkeeper informed that sometimes the cash books would not be entered up for 2 or 3 months, in this way Hassett was enabled to and as I am informed and believe did use the funds of the Beaver Hill Company for Mr. Graham's private business and the railroad business, without being compelled to enter the transactions in the books of the company. This $30,000. transaction was one of such. I asked Mr. Hassett why the Beaver Hill Company needed 6 million feet of logs at that time,—he replied to me 'Virtually they were Beaver Hill

logs all the time.' Then I asked 'Why were they not placed on the Beaver Hill books?' He replied and I took the reply down in writing at the time, 'When Graham wanted to use any money for logs he charged himself with the money.' I asked—'Took the money from the Beaver Hill Coal Company as requisitioned by you from Spreckels?' And he replied 'Oh, yes, and we made requisitions for and specifically said it was to pay loggers.' I then said '*As a matter of fact, they were Beaver Hill Company's logs and the first showing in the books is this $30,000.?*' And Mr. Hassett answered '*In the rough, yes*'. During my recent interview with Mr. Hassett on June 15th, 1898, he said to me 'I always gave Spreckels a fair deal.' And I replied to him 'When Mr. Graham's individual interests were at stake I think you always made mistakes in Graham's favor.' To this he replied 'Show when.' I thereupon replied 'You turned over a book of logs in December and guessed that they contained 6,000,000 feet when the present figures show only about 5,400,000 feet?' He answered 'The balance of the logs were cut up into lumber and sold the Spreckels Commercial Company in San Diego', thereby admitting but for the San Diego sale he had overcharged 600,000 feet. I know that Graham has within one month claimed that the San Diego shipment was his private account and that he attempted to pay over $2,000. interest due from him personally to J. D. Spreckels & Bros. Company for the May interest on his note to them for $523,162.52 by the use of the credit of that San Diego shipment claimed by Mr. Hassett to be Beaver Hill Company's logs. At said interview on January 7th, 1898. said Hassett said to me that the logs cut from the Beaver Hill property were intermingled with the logs bought by Graham and that there was no means of identifying the lumber from logs grown on Beaver Hill land and other logs and admitted that Mr. Graham still owed for certain stumpage to Beaver Hill Company for logs cut on their land. I then asked him why Beaver Hill was charged from $2. to $3. a thousand more for logs and lumber bought from Graham than current cost cash rates at Coos Bay, and he replied that it was not so,

adding 'The thing is supposed to be net,—it is as near as can be figured, that is the orders Graham gave me.' I am informed by experts who have examined these logs in the boom covering this $30,000. transaction and I verily believe that nearly all over 95 per cent of these logs are pine and fir and cost and are of the value of from $2.50 to $3.00 per thousand and that Graham never paid over $3. per thousand including freight and stumpage for such logs and the said logs though bought with Beaver Hill money in order to make good the shortage which showed on Graham's account at the time of his discharge was by said Hassett, the present receiver of defendant corporation property, accepted and credited by said Hassett at the rate of $5. per thousand on a guess as to quantity which when measured was, as I am informed by experts and believe, 600,000 feet over the amount actually in the boom. And this notwithstanding the fact that Graham told him to charge neither profit and loss and while the logs received by Graham from Beaver Hill lands were unaccounted for by him or his bookkeeper Hassett."

Mr. Powers goes into detail, in his affidavit, as to the note for $11,800.00.

"Another item in said cash book was a note for $11,800. dated Dec. 1st, 1897, executed by said Graham to Beaver Hill Coal Co., payable one year after date. I learned that this transaction had been carried on by Hassett & Graham long after and not before his discharge as its date seemed to indicate. On January 7th, 1898, I asked Hassett, now receiver, when this note was given. He looked at it and replied 'December 1st'. I said, 'I see it is dated then, but when was it actually signed?' He replied, 'About the time of its date'. I then showed him that it was entered in the cash book at a date which would necessarily make it about December 24th, 1897. He then said that he remembered that it was executed some time along about December 15th, or 20th, and that it was antedated for convenience of bookkeeping to December 1st. The cash book showed as contra to this note one voucher over a year old, for

\$1476.85 explained as money used to pay Graham's life insurance policy which Hassett said Spreckels had agreed to; another item of \$3100. was on a voucher dated February, 1897, and reference to it was 'R. A. Graham open \$3000. cash loaned account No. 1 (verbal order J. B. H.)'. Mr. Hassett was unable to give any clue as to what these items were that constituted the loan and notwithstanding that reports were made to the San Francisco managers each month since February, 1897, no report was ever made of said loan. Another item included in the \$11,800. note was \$2950. which Graham wanted to borrow to pay his insurance which was about to come due, and an item which Mr. Hassett was unable to explain other than the entry 'For Graham's future credit \$4019.75.' ''

Mr. Powers, *inter alia,* tells of a \$5000. credit:

''On January 7th, 1898, Hassett called up a matter of a credit which he claimed for Mr. Graham amounting to \$5000., saying it was an overcharge of interest. I then called his attention to the fact that he had already attempted to insert it in a trial balance of Dec. 1st, 1896, and from that time on till September, 1897, and that Spreckels' treasurer had written asking an explanation and that it had been dropped.''

He tells, also, of the juggling of the bank accounts, to which Mr. Hamilton also spoke. Mr. Powers says in his affidavit:

''On January 7th, 1898, said Hassett explained to me that he made out requisitions on behalf of the Beaver Hill Coal Company on J. D. Spreckels & Bros. and thus obtained a cash deposit in the Roseburg Bank for the company on its credit. That he had one account under three heads in the Flanagan & Bennett Bank at Marshfield, known as Accounts J. B. H. No. 1, whereby he transacted Graham's private business; J. B. H. No. 2 whereby he transacted the Coal Company's business; and J. B. H. No. 3 whereby he transacted the railroad's business. As soon as the money would come to the

Roseburg Bank through account No. 2 he would get it to the Marshfield Bank. I was informed by Mr. Flanagan, of Flanagan & Bennett, that Mr. Hassett had arranged to have all three accounts considered as one and that each should be responsible for the other so that as long as there was any money in one there could be drawn an equal amount in the other. I questioned Mr. Hassett about it on January 7th, 1898, and he admitted the facts and I then asked him the question 'If, for instance, No. 1 has $10,000. on hand and No. 2 is overdrawn $4000. and No. 3 is overdrawn $3000., how much would J. B. Hassett have in bank?' To this said Hassett, now receiver of No. 2, replied, 'In that case $3000. but these figures are altogether too high, because on the average I would have on hand from $800. to $2000., and by means of having these three accounts and a friend over in Roseburg I was able to have a few dollars on hand and keep either account from borrowing money from the bank in a pinch. The one thing I would try to do would be to save Sheridan in Roseburg.' I am informed and believe that by the use of these three accounts said Hassett diverted large sums of money from the account of said Coal Company to that of Graham and the railroad in the following manner: Said Hassett would by draft on Roseburg through J. B. H. No. 2 place all the money of the Coal Company in his account—personal—at Marshfield subject to be borrowed by said Graham without appearing on the books through overdrafts on account J. B. H. No. 1, which was secured by No. 2. In this way I am informed and believe Hassett would overdraw for Graham to buy logs at from $2.50 to $3. per thousand with money guaranteed by Beaver Hill Coal Company's account and then sell the logs to the Beaver Hill Company as lumber at rates which would give Graham a profit of from $2. to $4. per thousand and thus by the time the new trial balance would come around the payment of the lumber would make up the overdraft in No. 1, and exhaust No. 2 until replenished by the Spreckels people for Beaver Hill Coal Company.''

In this same proceeding—it was before Judge Bellinger of the United States District Court,—being the Graham suit against the Beaver Hill Coal Company, in which the state court appointed Hassett, *ex parte,* as receiver, the cause thereafter being removed to the federal court—further evidence was introduced on the application to oust Hassett as receiver. The affidavits of J. D. Spreckels, A. B. Spreckels, F. S. Samuels, W. D. K Gibson, F. J. DeNeveu, C. H. Merchant, D. L. Watson, John Curran, Alexander Love, Joseph Grundy, Frank Chapelon, W. J. White, John Rosby, and L. A. Lewis went in evidence. They go to the dealings between the parties, Graham and the Spreckels Company, to the mismanagement of the property by Graham, to his relations with Hassett, to his irregularities and misappropriations, and to the worthlessness of the coal mine which Chandler was compelled to shut down. They are particular and detailed, many of them, to a degree. It is unnecessary to examine them at length; it would not bring coal to Graham's coal mine, but it would be bringing coals to Newcastle. The result of it all was, that Judge Bellinger turned Hassett out, and put Mr. Catlin in as receiver.

These affidavits are indicated, in the printed transcript, as having been read at the trial, but are not printed *in extenso.* They are a part of the record in the cause, however, and are brought here with the original judgment roll in this receivership case. It will be understood, as a fact, that it was Graham, not the Spreckels Company, that precipitated the litiga-

tion between the parties. Graham had been removed for mismanagement from the control of the coal property. He could not be removed from the railroad, because the directors were his creatures. He knew that he had been guilty of frauds and embezzlements, and that investigation would come. Ousted from the coal company, he seeks to get back, through his man Hassett, and his method was, to bring this receivership suit in the state court, and have Hassett appointed receiver, with full powers, on an *ex parte* order. It was in the proceeding by the Spreckels Company to get rid of Hassett, a proceeding that had the countenance and final approval of Judge Bellinger, that these affidavits were filed. They exposed the real situation. They dispose of Graham's mendacious and shameless charge of oppression. They reveal who the victim was in these transactions between the parties. They are evidence as *res gestae,* part and parcel of the history made between these parties, and they demonstrate the good faith and the long suffering of these appellees (pp. 483, 484, 306).

It was not until Graham had begun this receivership suit, that the Spreckels Company went into the courts at all. The revelations of the receivership suit were what led to the accounting suit brought by the Beaver Hill Coal Company against Graham for an accounting, in which he was proceeded against for these misappropriations and embezzlements. He talks of an article in the San Francisco Bulletin, relative to this accounting suit and to the charges against him therein made. He makes no attempt to connect these appellees with

the publication of that article, and the newspaper was within its rights, for the suit was public property. But he pretends to say that this article was made prominent by being posted on the building and windows of the company's office at Marshfield. He is flatly contradicted by Dr. Mingus, of Marshfield, who was at the building practically every day (pp. 630-631); and this is a part of the "oppression" alleged.

As Graham and his directors were in control of the railroad which the Spreckels Company had built, and into which it had put so much money, suit was also brought by the Spreckels Company for relief, including a receivership, against the Coos Bay, Roseburg and Eastern Railroad and Navigation Company, in the Circuit Court of the United States, for the District of Oregon; and finally, we have the suit for a foreclosure and sale of the securities, in Judge Bahr's Court, the Superior Court of San Francisco, brought by the Spreckels Company on Graham's note for $523.-162., advances and interest. Pursuant to the contract of the parties, 5% commission was charged against the advances, and interest was adjusted, as upon all accounts of the company, quarterly (pp. 629-630). It is now complained of, we presume as being "oppression", that this interest was reckoned and adjusted quarterly. But Graham does not deny any part of the amount and indebtedness of this note. On the contrary, he admits it, under oath, in writing, and in his amended complaint in this case. In paragraph V of that complaint, page 22 of the printed record, he says:

> "On the first day of November, 1897, as a result of the various business enterprises in which the defendant, J. D. Spreckels & Bros. Company, and plaintiff were jointly interested, there became due and owing by the plaintiff to the said defendant, the sum of five hundred twenty-three thousand one hundred sixty-two and 52/100 ($523,162.52) dollars."

This note was a consolidation of the original and relatively small notes given by Graham when he first got the rails from the Spreckels Company, and of the further advances thereafter made to build the road to Myrtle Point. Beyond that point, though there had been some talk about extending the road to Roseburg, there was no understanding for any advances, the Spreckels Company "didn't agree to that at all" (p. 547). The note of November 1st, 1897, for $523,-162.52, was secured by ten thousand and one shares of the capital stock of the railroad company, 620 of the bonds, a deed of the Marshfield land which Mr. Merchant had given as a subsidy; the company also held an insurance policy. Graham does not attempt to deny this:

> "At the time that the book account was consolidated into the note of November 1, 1897," he testified, "the Spreckels were holding the stocks, the bonds, the Marshfield deed, and the insurance policy."

Graham would now pretend, by way of "oppression", that there was a broken understanding in respect to the signing of this note—that he was to receive back twenty-five hundred out of five thousand shares, of the Beaver Hill Coal Company stock, and the insurance policy just mentioned. He selects Mr. A. B.

Spreckels, who was prevented, by a paralytic affliction, from testifying, but the taking of whose deposition, at serious hazard to him, was tendered to, but not accepted by, the plaintiff (p. 542),—as the one with whom the alleged understanding was had. But the Beaver Hill stock never had been held as security for the obligations gathered up into this note; there was no reason why it should be given back; and as to the insurance policy, it was held by the Spreckels Company, provided for and secured by, and securing, the payment of the premiums which the company was making (p. 583). Graham did not own any part of the Beaver Hill stock, he had no right to it. The property was bought and paid for by the Spreckels Company. It was expressly agreed in writing between Graham and the Spreckels Company "that the entire capital stock of said company (Beaver Hill Coal Company) is to be held *and owned* by the parties of the second part"—this is the so-called Norman agreement, Graham being the first party, and the Spreckels Company the second parties—

> "until such time, as has been hereinbefore provided, that the surplus profits exceeded the sum necessary for the liquidation of interest, and any indebtedness of party of first part to parties of the second part has been cancelled; *then* one-half of the capital stock shall thereupon become the property of the party of the first part, and is to be transferred to the party of the first part or his assigns" (p. 248).

Although Graham saw A. B. Spreckels again, the next morning, after this pretended understanding, there was someone else present at that time—J. D. Spreckels,

who was able to testify and did testify at the trial. Graham will not say that when J. D. Spreckels was present that next day, there was a word said about returning the Beaver Hill stock or the insurance policy.

> "I have no separate recollection", Graham testifies, "that, in that conversation and in the presence of J. D. Spreckels, I made any reference to the statement that my Beaver Hill stock and insurance policy were to be returned to me at Marshfield" (p. 390).

And Mr. J. D. Spreckels testified:

> "I never at any time, nor did my brother A. B. Spreckels ever at any time, in connection with the making of this five hundred thousand dollar note promise Mr. Graham that I would send him half of the Beaver Hill stock, and any life insurance policy. I was never notified in the course of the business of J. D. Spreckels & Bros. Company that any such promise had ever been made. My brother and I discussed not only this, but every matter in the operation that came up in our line of business, and that was thoroughly discussed between us, everything that occurred in relation to the Beaver Hill Coal Company, and also the railroad" (pp. 539-540).

This oppressive breach of an understanding that never was had, is one of the things that Graham "refreshed" himself upon, from the "diary" that he keeps. He makes testimony—and we shall illustrate it further—as he goes on. For this record shows that he is a professional litigant, that he has been in one litigation after another in respect to these properties and transactions, and that in every instance he has failed—including the verdict of an Oregon jury, in an action brought by him against the railroad company for alleged salary, which was tantamount to a finding that Graham had committed plain perjury (p. 375).

Now, then, on April 27th, 1898, he proceeds to make evidence by writing to the Spreckels Company as follows:

> "When I gave the note to you on November the 1st last it was agreed between your Mr. A. B. Spreckels and myself that my stock in the Beaver Hill Coal Co. was released from any further claim upon it, and that the life insurance policy assigned to you would be transferred back to me. I have not received the stock nor the policy. Please deliver them to the bearer for me" (p. 390).

On the very same day, without any loss of time, Graham got the following answer:

> "Dear Sir:
>
> Replying to your memorandum of 27th instant, regarding Beaver Hill Coal Company's stock and life insurance policy, I have to say that there was absolutely no such understanding, or even a conversation in regard to the transfer of stock or life insurance policy to you.
>
> Yours truly,
>
> A. B. SPRECKELS" (p. 391)

There was a proposition, however, from Graham in respect to the Beaver Hill Coal Mine, which Mr. Samuels refused and "killed". Mr. Samuels tells about it (pp. 602-3):

> "Mr. Graham after he came down we were beginning to find out that he was stealing our money—to speak plainly; that he would requisition on us for sums of money which he would divert for other purposes. After the note was signed, or before, Mr. Graham came to us with a proposition that he had made out by Mr. Deering that if we would give him—I think about seventy thousand dollars, and let him have the mine for one year, if he didn't make the mine pay he would step out. In other words, he wanted us to make him a present of $72,000. or something like that, and turn over our

> property to him, and at the end of a year we would get back the shell, if we got back anything; that was the proposition that came to me, and I flatly refused to have anything to do with it. Mr. Graham brought the proposition to me. It was about that time in 1897. I could not say where he talked to me about this. I don't think Mr. A. B. Spreckels was present with Mr. Graham and me. I will concede this: If we had taken that to Mr. Spreckels and Mr. Spreckels had spoken to me about it, I would have flatly objected—Mr. Spreckels could have done what he pleased, but I certainly would have flatly objected. If Mr. A. B. Spreckels had promised to advance sixty-five thousand dollars to Mr. Graham and had agreed to keep him in as manager for a year, you bet I would have killed it if I could. As a matter of fact I did kill such a contract, otherwise it would have been signed."

We have some idea, now, as to what the Spreckels Company spent and endured in respect to the Beaver Hill Coal Mine. We know, now, what the company advanced to build the railroad. Those advances were represented by book account except as to the two notes given at the start for the first rails. This account was secured by ten thousand and one shares of the railroad stock, 620 of the bonds, and the Marshfield land;—the self-same securities that went under the note. The note itself was only a change in form of the liability, and it had the effect of extending Graham's time to pay for six months. It was drawn up on the advice of Mr. Preston, the company's attorney (pp. 582, 601). Graham signed it, and he admits, in his amended complaint, that he owed it. For several months he paid the interest.

No suit was launched against him on the note, until after he had brought this suit against the Beaver Hill

Coal Company, in which he had Hassett appointed receiver. Nor was any suit brought against him on the note until after he stopped paying interest. And he undertook to use, for the payment of interest, property of the company—these very logs concerning which we have called attention to the testimony of Mr. Hamilton and Mr. Powers. We quote the testimony of the secretary of the company, Mr. Samuels:

> "We didn't commence to sue him until after he stopped paying interest on the note. I don't think he was paying interest at that time except as it was charged against him on the open account. I think it was charged right on the open account. When he had become 60 days in default on a disputed payment of interest on the note, I launched suit against him for the foreclosure of these securities, after 60 days. We could have done it within 30 days. We had a reason for doing it then. At this time Mr. Graham had a dispute with me as to whether or not there was a credit in our hands for logs shipped to the Spreckels Bros. Commercial Company. We had collected that money from Spreckels Bros. Commercial Company, and would not pay it to him on his note. We did not subsequently admit that he was entitled to it. We told him there was no money due him. I certainly wish to state that he was not entitled to the proceeds that had come into our hands from the Spreckels Commercial Company on those logs, because those logs belonged to us. We paid for sawing them. We hadn't proof at that time that those logs came off the Beaver Hill Coal Company's lands, but we had a strong suspicion that they had. They came out of the Beaver Hill Coal Company's beam. I don't know that these logs had been individually purchased by Mr. Graham with his own funds up the river, and put into the book and marked with a separate mark. He requisitioned on us to cut logs for the Spreckels Commercial Company shipment; also for the labor attached to that, which he paid Seeley for cutting our logs. He would charge us for cutting the logs, charge us for sawing

> them up; then he would sell them back to us; and that is what accounted for what he sold to this Spreckels Brothers in San Diego; we had this item in his requisition account, requisitioned from him'' (pp. 613-614).

Suit was accordingly brought to foreclose on the note and securities. The very purpose of that suit was to end the security, as such, to apply it on the obligation—not to continue it. Mr. Preston represented the plaintiff, the Spreckels Company; Graham was represented by Mr. Isaac Frohman, from Judge Garber's office, and by Mr. A. A. Moore. After the case had been on trial for something over 20 days, a proposition came of settlement—not from the Spreckels Company, at all, but from Graham. Mr. J. D. Spreckels testified (p. 541):

> ''Referring to the agreement of June 8, 1899, I recall generally the circumstances that there was a suit pending in the Superior Court to foreclose the lien or pledge of these securities. I recall also that in that agreement a judgment of foreclosure of that very lien and pledge was provided for, the judgment to be stayed for six months. I knew Harry T. Creswell. He was a friend of mine. He was a member of the firm of Garber, Creswell & Garber. I think I had a conversation with Harry T. Creswell prior to the settlement of June 8, 1899, in which he talked with me about this litigation at the club on one occasion; at the Pacific Union Club, in San Francisco; he says: 'Why can't we settle this thing, and settle it for all?' I said: 'Well, if it is going to be settled, *it has got to be settled for all.*' Then I said: ' I don't want to engage in any settlement. We will go and talk it over with Mr. Preston.' That was the first suggestion to my knowledge looking to a settlement of this matter.''

Mr. Isaac Frohman, of the California bar, who was Graham's counsel in the foreclosure suit on the note,

and who actively represented Graham on the final settlement, was a witness in this case, called by the Spreckels Company. Mr. Frohman gave his testimony in San Francisco, by deposition. The deposition is in the record, pages 515-535, and is interlarded with objections, on the part of Graham, to the development of the evidence. Of this, more anon. Mr. Frohman says (pp. 519-21):

> "The circumstances leading up to the execution of the agreement were that when the case was on trial about twenty-eight or thirty days, the trial was suspended, negotiations were opened between R. A. Graham and J. D. Spreckels & Bros. Company mainly by E. F. Preston, and those on behalf of R. A. Graham being conducted mainly by me. As a result the agreement of June 8th, 1899, was entered into and executed. I certainly had more than one conversation with Mr. Preston relating to or looking forward to the execution of this agreement. I had several such conversations, I suppose. I met with the experience that an attorney usually meets with when he is negotiating with the attorney of his adversary, as to matters pertaining to the disposition of pending litigation and controversies. The agreement in question dated June 8, 1899, is the expression in terms of the result of those negotiations. In addition to the suit of J. D. Spreckels & Bros. Company v. R. A. Graham, there was then pending between these two parties various controversies. Mr. Preston stated that if the pending suit of J. D. Spreckels & Bros. Company against R. A. Graham, was to be settled, he wanted to have settled all matters in controversy between the parties, and certain corporations in which they were interested. I believe one was called the Beaver Hill Coal Company or the Beaver Coal Company, and the other the Coos Bay, Roseburg & Eastern Railroad Company. You have handed to me three papers which were the outcome of the negotiations that I have referred to. I think there were a number of others which were ultimately drawn up and made with the approval of the

attorneys for both sides, I mean by that, E. F. Preston, W. L. Pierce on the one side and the attorneys representing R. A. Graham on the other, and I must modestly say when I speak of the attorneys representing R. A. Graham, that I had the brunt of the work of the drawing of the papers and the negotiations to bear. I cannot sum up in a sentence or a page all that I said to Mr. Preston. There were numerous conversations, and they all had to do with the phraseology of the agreements, and they had to do with the objects set forth in the agreements and other documents involved. The matter of statements that may have been made to me or that I may have made to Mr. Preston do not remain in my memory. To the best of my recollection I said to Mr. Preston that he should draw up such papers as he would require to be executed, and that I would go over them with Mr. Graham. I believe that that is the turn the thing took, that he first drafted the papers he wanted executed. I should say that this agreement may have had that general form when first presented. The agreement is the outcome of those discussions. I looked over the agreement. I do not recall any reservation in my mind as to whether the language of that agreement meant something different from what it purports to speak. I can recall no reservation in my mind on that subject. I do not think Mr. Graham would have signed it if I had told him not to. So I should assume that I told him and that I advised him to sign it."

Indeed, it came out as part of the plaintiff's case, and as coming from Mr. Frohman himself, "that the agreement he proposed would be so fairly and plainly drawn that neither party could wriggle out of it" (p. 480).

Now, in his complaint, Graham had alleged, in respect to the settlement of June 8th, 1899, that he had been advised by his counsel, that it was a mortgage, a continuing security. On the witness stand, during

direct examination, he named John Garber, as having advised him "that this instrument constituted a mortgage, before I signed it" (p. 339). Judge Garber was then dead—there was no fear of contradiction from that source. He admits that Judge Garber never attended court at any time during the trial of the case, that it was Mr. Frohman who actively conducted negotiations for the settlement with Mr. Preston, and that it was by Mr. Creswell that the first suggestions of a settlement were made (p. 429). But he was not asked on direct examination, as to whether Mr. Frohman had ever advised him that this settlement was only a mortgage. Mr. Frohman was still alive. But that precise question was put to Graham on his cross-examination, and he had the assurance to testify that "Mr. Frohman told me that that instrument was a mortgage during the making of the instrument" (p. 432).

Now, then, Mr. Frohman's attention was called, at the deposition, to Graham's allegation as to the "continuing security" of this final settlement (p. 521). And Mr. Frohman was asked whether he had advised Graham on the subject. Repeated and insistent objections were made on behalf of Graham, that Mr. Frohman, if he testified, would be violating a professional confidence. Finally, Mr. Frohman, "in view of the fact that objection is raised by Mr. Graham's counsel to the question," declined to answer (p. 529).

Graham's testimony at the trial removed any possible objected to the evidence sought to be elicited from Mr. Frohman. Appellees then requested Mr. Frohman

to come to Portland. Even then, Mr. Frohman felt a delicacy about testifying against his former client, however constraining in law and ethics the reason now was that the truth should be told. The upshot of it was, that appellees consented to take the statement of Mr. Frohman by telegram; and thereupon a telegram to Graham's counsel from Mr. Frohman was read in evidence as follows, with the understanding "that if Mr. Frohman was present, he would so testify". "My best recollection is", says Mr. Frohman, "I did not advise Graham agreement constituted a mortgage" (p. 536).

The final settlement of June 8th, 1899, was made. The parties themselves did not meet, were not on speaking terms. The negotiations were tendered by Graham's counsel. They were conducted between the attorneys for the parties, mainly by Mr. Preston and Mr. Frohman. The purpose avowed on all hands, and the thing intended to be done, was to effect a final settlement, to make an end of everything; not to continue and protract a mortgage then in process of foreclosure, to be foreclosed all over again at the end of six months. The law must be weak indeed, and courts must be powerless, if such a settlement can be stultified and stricken down.

The settlement having been made, Graham pretends that the Spreckels Company tried to thwart it. He gives a mythical conversation, at the time of the settlement, which he claims to have had with C. P. Huntington, who, like John Garber, is dead. Huntington is represented as having said to Graham:

> "Well, don't agree to anything less than six months. Get more time, if you can, but if you can't get but six months, why that will do. We will have to settle."

And the Southern Pacific Company was to advance Graham $550,000 (p. 335). This is the second dead man's conversation. George Crocker is also brought in—another dead man. He was to look into the matter with Graham, but later he was not friendly, and told Graham that Mr. Preston had advised him not to buy the road from Graham, it would be buying a lawsuit, and the company could get the property cheaper later on (p. 341). Huntington comes in again, this time in New York, tells Graham that Crocker is not friendly, and advises Graham to see Speyer in London. A letter from Huntington to Speyer is mentioned, but is never produced (pp. 345-6). Again, Huntington is seen in New York, and,—shades of Baron Munchausen!—this time in company with Russell Sage, and it appears from the "diary" that Huntington, Russell Sage, and Graham argued the matter over until half past 2 o'clock in the morning at Russell Sage's house, "and Sage agreed to take a million of the bonds if *we* would take the balance, and Huntington promised Sage he would try to have the S. P. take the balance" (p. 346). It is needless to say that Russell Sage is dead—whether his death was in the nature of an untimely taking off, superinduced by sitting up until half past 2 o'clock in the morning with Graham and Huntington, "mulling over" this 25-mile railroad, is a problem which this record does not resolve.

One living man, however, is named, Mr. Samuels, Graham says that he told Samuels about Preston "knocking" him with Crocker and the Southern Pacific, and that Samuels told him Preston would have to quit. This delicious morceau comes from the "diary" (pp. 342-3). Mr. Samuels explodes the story. He says, precisely and categorically that it is "absolutely untrue" (pp. 589-590, 590-591). Mr. J. D. Spreckels likewise disposes of the story (p. 556); and also disposes of any pretended negotiations with Harriman, another dead man (pp. 556, 558). Graham again refers to his diary, in respect to J. D. Spreckels, and is able to "refresh" his memory as to having seen J. D. Spreckels in December, ~~1900~~ 1899, at the office of the Farmers' Loan & Trust Company in New York, and asking him there if he thought he should let Preston carry on a warfare against Graham. This is the extract from the diary:

> "Seen J. D. S. at the Farmers' Loan & Trust Company's office. I asked him if he thought he should let Preston carry on a warfare against me. He said Preston was without authority to talk. I told him authority or not, the result was the same. He said he would see Huntington as they needed the money" (p. 449).

But the diary is met by a living witness. Mr. J. D. Spreckels testifies that he was not in New York at the time in question, that he was not there until 1900, and that he has never been inside the office of the Farmers' Loan & Trust Company (pp. 542-3). The Graham diary also contains the statement that J. D. Spreckels, according to Graham's information from Mr. Marsden, president of this trust company, was in New York trying to sell bonds for his steamship line

(p. 448). Another fiction. Mr. Spreckels "made no attempt to get any bonds placed in any corporation or any banking house or any place in New York,—those bonds were all placed in San Francisco, and placed there by myself". And finally, as to Preston and the alleged obstruction or "knocking", and the entry or entries in the "diary" Mr. Spreckels gives this categorical testimony (pp. 540-541):

> "Q. Mr. Spreckels, at any time, did you ever have any conversation with R. A. Graham in respect to Mr. Preston interfering with any transaction in any way between Graham and the Southern Pacific Company?
>
> A. Well, that was a period after the litigation.
>
> Q. We will take the period—I will draw your attention to the point of time subsequent to the settlement of these matters on June, 1899.
>
> A. I was not on speaking terms with him, even.
>
> Q. It has been said here by Mr. Graham that he had a conversation with you at the Waldorf-Astoria Hotel in New York in which the subject matter of Mr. Preston interfering with his dealings with the Southern Pacific Company looking to a disposition of the railroad properties involved in the Coos Bay situation, and that you said to him that Preston had no authority to interfere with him, or that business. Did any such conversation take place?
>
> A. No, that is absolutely untrue.
>
> Q. Did you ever at any time authorize Mr. Preston to go to Mr. George Crocker or Mr. C. P. Huntington, or anybody connected with the Southern Pacific Company, and notify him, it or them that if they should take over in any way this property involved in the Coos Bay situation, that they would be purchasing lawsuits?
>
> A. I did not.
>
> Q. Did you ever authorize or instruct Mr. Preston to make any statement of any kind touching any matter involved in the settlement of June 8th, 1899, to the Southern Pacific Company, or anybody connected with it?
>
> A. I did not.

Q. Did you ever know from Mr. Preston that he had ever done anything of that kind?

A. I never knew.

Q. Did you ever hear until the litigation here, that such a thing was ever claimed?

A. I did not."

Some attempt was made at the trial to carry the impression that when the Spreckels Company took possession of the railroad company's office, pursuant to the final settlement, a sort of military descent, with force and arms, and circumstances of terror was made upon the office, and upon Hassett, who was in charge. The reading of Hassett's testimony, taken by deposition, shows the whole thing to be a figment (pp. 495-8). Mr. Chandler took possession quietly and peaceably and Hassett was permitted, as we have already noticed, to use the office for some ten days or two weeks after Chandler went into possession. On the occasion in question Chandler was accompanied by Judge Coke, afterwards Judge of the county, by the sheriff of the county, and two detectives, and by Dr. Mingus (pp. 499-501 and 630-631).

So much for the "oppression" by these appellees in employing Preston to thwart the final settlement. The incompetency of the testimony itself requires no argument. The character of the testimony is written on its face. Judge Garber, Huntington, Russell Sage, Harriman, George Crocker, Preston,—"the voices of the dead". An attempt to put parol declarations, long anterior to the trial, into the mouths of dead men, "cannot be too carefully scrutinized by courts and juries" *(Davis v. Davis,* 26 Cal. 23, 44). The language

of Chief Justice Currey, in the case just cited, is comprehensively applicable to Graham's testimony. It is language that has become standard in the books:

> "In all cases it is the most dangerous species of evidence that can be admitted in a court of justice, and the most liable to abuse. In most cases it is impossible, however honest the witness may be, for him to give the exact words in which the declaration or admission was made. Sometimes, even the transposition of the words of a party may give a meaning entirely different from that which was intended to be conveyed. The slightest mistake or failure of recollection may totally alter the effect of the declaration or admission. *And more than this, it is most unsatisfactory evidence, on account of the facility with which it may be fabricated, and the impossibility, generally, of contradicting it when false.*"

Fabricated and false—these words, as used by Chief Justice Currey, are the only terms in which this plaintiff's case and his charges of oppression can be adequately qualified. And for this, we are able to add the evidence in writing, furnished by Graham over his own signature. It was Graham who sought systematically to thwart and obstruct the realization of the final settlement. That settlement provided for the reorganization of the railroad company, and the retirement of Graham's directors, but it became necessary for the Spreckels Company to sue the railroad company, still in the hands of the Graham directorate, notwithstanding the settlement, in order to compel a registration in the name of the Spreckels Company or their nominees, of the railroad stock (p. 435). Graham was charged in that case with improper diversion of funds. The Farmers' Loan & Trust Company, shortly afterwards, began a suit for the foreclosure of the

bonds, and in that suit Graham intervened (p. 435). Graham admits that he personally sent to A. B. Spreckels from New York, a dismissal of his intervention in the latter case, and a consent to the entry of judgment in the former case, omitting the charge of diversion of funds (pp. 435-440). In the action for salary, in which we have referred to the vedict of an Oregon jury as, in effect, convicting Graham of perjury, he testified that at the time he sent on these dismissals, it was with the understanding that his claim for salary against the Coos Bay, etc. Railroad Company, "*which was the only thing that I claimed off of them at that time* would not be jeopardized" (p. 441). This was in 1905. On February 8th, 1905, Graham encloses the dismissals to A. B. Spreckels in a letter marked "Defendant's Exhibit A" (pp. 446-8, 594-5). This letter, written some six years after the final settlement, is as follows:

"Room 512, 52 Broadway, New York City.
Wed. February 8, 1905.

"Mr. A. B. Spreckels,
San Francisco, Cal.

Dear Sir:

The enclosed papers will explain themselves, and I trust you will receive them in the same spirit they are sent. It would only be adding *insult to injury* for me to enter into any elaborate discussion to point out to you that I am doing you a kindness and myself a great injustice, *I am not.* I am doing this of my own motion without the consent or knowledge of my lawyers, and with only two motives. One is *I am sorry for the annoyance and trouble I have caused you by getting you into Oregon and will make further reparation when I can by getting you out as near whole as I can.*

"And the other is that the litigation here with Harriman has been so long drawn out and the end is not yet in sight, that I am broke. While I have no apprehension as to the final result here, I have got to husband my resources, which are now limited to what I can earn to carry on the war with and pay expenses. And until this is ended and I have received something substantial from the results, I will have nothing to offer you to turn the property back to me for, provided of course you want to discontinue the control of it at that or any other time. The decisions we have had here and the last one which we have recently received is all that I could ask for, but it is now evident that I can only get the benefits when the Supreme Court has had its last say, as it seems to be their policy to end nothing until the last ditch has been crossed, with the hopes that I will fall down by the wayside for the lack of money to carry on the fight with, and I understand from them that Harriman is amply justified in this conclusion by what appears to him to be reliable information which he is receiving abundantly from Oregon. *If these papers meet with your approval as far as they go, and they are unsufficient to attain the object which I have in view, viz., to dismiss and settle the whole proceedings forever, I shall supply them upon hearing from you.*

"I am,

"Yours truly,

(Signed) R. A. Graham.

"Since having those papers prepared, I have been laid up sick and that gave me time to think about that insurance policy on my life. *As it seems to be the only thing unadjusted between us,* what can you do in the matter in justice to yourselves? Yours R. A. G."

We conclude this statement of the case with the following excerpt from the opinion of Judge Bean:

"The evidence, in my judgment, does not show that the contract was made under circumstances which render its enforcement unconscionable. It was voluntarily entered into by the plaintiff after days of negotiation, with full knowledge of all the facts, under the advice

of able counsel, and there is nothing in the testimony, so far as I can see, to indicate that plaintiff was overreached or imposed upon in any way in the making of the contract. It may be, and perhaps is true, that he was in stratened financial circumstances, and believed that the contract promised the most feasible way for him to save something out of his Coos Bay ventures, but if so, it affords no legal reason why the contract should not be enforced as made. The bill will therefore be dismissed'' (pp. 176-7).

I.

THE AGREEMENT AND TRANSACTION OF JUNE 8th, 1899, WAS NOT ONE OF MORTGAGE OR CONTINUING SECURITY, BUT WAS, AND IT WAS MEANT AND UNDERSTOOD TO BE, A COMPLETE ADJUSTMENT OF ALL MATTERS OF DIFFERENCE.

It is inconceivable that the settlement of June 8th, 1899, could have been, or that anybody understood or believed it to be, a mere mortgage and continuing security. Its precise, considered, and careful purpose was to end anything like mortgage, or a continuing security. Its aim and intent, as conceived and expressed, was not to continue an existing and intolerable condition of things, but to abolish it. There had been mortgage enough and continuing security already. The creditor had brought his suit to foreclose—to foreclose on this railroad indebtedness, and on the Coos Bay stock, bonds, and land that underlay the indebtedness as security. The foreclosure suit had gone to trial; it had been on trial for some 28 or 30 days. The proposal for a settlement came from the debtor. It is not believable that the debtor, not to speak of

the creditor, was proposing to settle a mortgage liability and litigation by going on with the mortgage as before, with another foreclosure suit in sight, to begin all over again. The Spreckels Company had something else on its hands besides this railroad mortgage and foreclosure suit; it had all these troubles in the Beaver Hill Coal Mine; it wanted to put an end to the relation of debtor and creditor in the railroad, to the relations and litigation with Graham in respect to the Beaver Hill Coal Company, the receivership, the accounting, to the receivership litigation in the Coos Bay Railroad;—to all relations, finally and forever, with Graham. And nobody understood that better than Graham and his lawyers, and hence it was that the final settlement of June 8th, 1899, opens with these words:

> "That the parties hereto, for the purpose of *completely adjusting all matters of difference* between themselves, *and* between *each* of them and the *Beaver Hill Coal Company*, a corporation, *and* the *Coos Bay, Roseburg and Eastern Railroad and Navigation Company,* a corporation, do hereby agree as follows."

The payment of $550,000, by Graham, under this settlement, was not a debt; he came under no obligation to pay this money—it was wholly optional with him, to pay it or not as he chose. The title to the property involved was put by both parties in the trustee; not simply the title to the stocks, bonds, and land, which Graham had hypothecated as security for the note in the foreclosure suit, but, as well, the title to the Beaver Hill Company's stock, which was, all of it, the property of the Spreckels Company. Graham

retained no future interest in the property which he had pledged, nor did he acquire any interest in this property of the Spreckels Company, except and only by a reservation to himself in the settlement, of an option to become vested with title from the trustee upon payment of $550,000.00. He could not be compelled to pay that money, it was not a debt of his, the relation of debtor and creditor did not pertain to it,—it was a mere option which he was at full liberty to exercise or not as he pleased.

We print the settlement of June 8th, 1899, as an appendix to this brief. The first paragraph deals with the dismissal of the receivership suit, brought by Graham against the Beaver Hill Coal Company, and in which, it will be recalled, Hassett had been, in the first instance, and ex parte, appointed receiver, and afterwards superseded by Catlin, pursuant to the order of Judge Bellinger. Paragraph 2 provides for the dismissal, and *at once*, of the accounting suit which the Beaver Hill Coal Company had brought against Graham, charging him with various delinquencies and embezzlements, and for a release, also to be given presently, by the coal company to Graham, of all claims and demands. Paragraph 3 provides for the dismissal, and *at once*, of the receivership suit which the Spreckels Company had brought against the Coos Bay etc. Railroad Company. Paragraph 4 provides that a judgment shall be "at once entered" in the foreclosure suit, and that all proceedings to enforce the judgment shall be stayed for six months, being the whole life of the agreement, as to which time

was of the essence. But this satisfaction operated at once as an equitable and absolute discharge of liability; for it was deliverable to Graham at the end of the six months—during which period, as noted, the judgment was inoperative—and deliverable to him in any event or contingency, no matter what happened; for it was provided in subdivision e of paragraph nine, that in the event of payment by Graham of the $550,000., the trustee should deliver to him the satisfaction of judgment, and it was provided in subdivision f of paragraph 10, that in the event of nonpayment by Graham, the trustee, all the same, should deliver to him the satisfaction of judgment.

The true character of the agreement of June 8th, 1899, as extinguishing the status of debtor and creditor, and putting the title to the properties in question in the trustee, and reserving to Graham, not an imposed or continuing obligation, but a mere option and choice to acquire title from the trustee on payment of the $550,000., comes out when we look at paragraph 6. It is therein provided that Graham shall deliver to the trustee "*all* of the shares of the capital stock of said Coos Bay etc. Railroad Company *in excess of the 10,001 shares* thereof now held by the second party, certificates therefor to be *properly indorsed,* excepting 7 shares thereof to be issued to the directors of said company as hereinafter provided."

We pointed out, in the statement of the case, that the note on which foreclosure proceedings had been brought, was secured by $10,001 shares of the Coos Bay stock, 620 bonds of this railroad company, and the

Marshfield land, as to which we shall have something to say. The remaining shares, exclusive of the few shares that went to qualify directors, were outstanding and unpledged, some 9,993 shares, held and owned by Graham, and in his name. The bonds were transferred to the trustee without further instrumentation; they were payable on their face to bearer. But these Graham shares, outstanding and unpledged, are required by the agreement to be properly endorsed, and, in fact, they were properly endorsed by Graham and delivered to the trustee. The only way in which Graham could re-acquire title to this unpledged stock—stock that was no part of the security for the note in foreclosure, free stock outstanding in Graham's name, was by the exercise of the option to pay the $550,000. Meantime the title was in the trustee. This is put beyond cavil by paragraph 9 of the agreement, from which we quote:

> "If, at any time within six months from the date of this agreement, the first party (Graham) shall pay or cause to be paid to the said trustee, for the use and benefit of the second party, the sum of $550,000. in gold coin of the United States, the *title* to *all* of the shares of stock, bonds, real property and judgments below mentioned, *shall thereupon vest in*, and the same *shall become* the *absolute property* of the first party."

Again, paragraph 6 provides as to the Spreckels Company, that it shall deliver to the trustee, "properly indorsed by the second party", the certificate for so much of the Coos Bay stock as was not outstanding in Graham; namely, the 10,001 shares of that stock which Graham had pledged to the second party as security for the note in foreclosure. The Spreckels

Company held these shares simply as pledgee; Graham owned them. But they went to the trustee. Graham could re-acquire title to this pledged stock, as he could re-acquire title to the unpledged stock, not by paying a debt but by exercising an option; and in such event, as shown by paragraph 9, just quoted, "the title to all of the shares of stock" and other properties mentioned, "shall thereupon vest in, and the same shall become the absolute property of the first party".

Again, paragraph 6 provides for the delivery by the Spreckels Company to the trustee, of all the shares of the Beaver Hill coal stock, excepting one share each for the present directors of the company, but these directors' shares shall be endorsed and delivered to the trustee as soon as possible, and held by the trustee along with the other shares of said stock; and in paragraph 9, subdivision a, "all of the capital stock of said Beaver Hill Coal Company placed in the hands of said trustee, and all of the shares thereof issued to said directors of said company, *all* duly endorsed," is to be delivered to Graham, if he shall exercise his option, whereupon, as we have already quoted, the title thereto shall vest in him, and the same shall become his absolute property. Not a share of this stock belonged to Graham, as we pointed out in the statement of the case, referring to the Norman contract; not a share of that stock was pledged for the note under foreclosure; every share of that stock was owned and held by the Spreckels Company. Under the agreement, Graham was to

acquire the title thereto, if and when he should exercise the option.

Again, as to the Marshfield land, which had been mortgaged by Graham as part of the security for the note, it was provided that both parties should join in a deed to the trustee:

> "The first and second parties shall jointly execute and deliver to said trustee a deed to the following described property situate in the town of Marshfield, in Coos County, Oregon, sufficient in form and substance *to vest the title thereto in said trustee;*"

a description of the land follows. Paragraph 9, to which we have made reference, provides that if Graham shall exercise the option, "the title to * * * the real property * * * below mentioned shall thereupon vest in, and the same shall become the absolute property of the first party," and the trustee is authorized to deliver to him "a good and sufficient deed of conveyance executed by said trustee to the first party, of the above described real property in said town of Marshfield".

The same provisions are made in respect to the 620 bonds, pledged for the note under foreclosure. We need not repeat them. It is thus apparent that there was no executory or continuing interest or title, in Graham, as to any of the property mortgaged under the note, as by way of equity of redemption. The equity of redemption, so called, is neither more nor less than a subsisting title, the title of the mortgagor subject to the right of the mortgagee to enforce his lien. Graham was reserving no title in himself what-

ever, but with clearly understood intent, he made a forthright and outright transfer of his title to the trustee, and reserved to himself the privilege and option of acquiring title from the trustee, if he chose to make payment of a stipulated consideration. The Spreckels Company, similarly, as appears from paragraph 6, had turned over to the trustee all of the capital stock of the Beaver Hill Company, and had also given up its pledge of the Coos Bay stock and of the Coos Bay bonds to the trustee, also assignments of certain judgments on subscription contracts, which it held in pledge from Graham; and had joined in the execution and delivery to the trustee of the Marshfield land; and it was only in the event of a failure by Graham to exercise his option, that the Spreckels Company should then acquire title to the securities and property in question, including the Beaver Hill stock which theretofore it had owned in its entirety. The language of paragraph 10 of the settlement agreement is as follows:

> "Should the first party fail to pay or cause to be paid to the said trustee, for the use and benefit of the second party, within said six months from the date hereof, said sum of $550,000., in gold coin of the United States, the *title* to *all* of the shares of stock, bonds, real property and judgments above mentioned *shall*, at the expiration of said six months, *vest in*, and the same shall become the *absolute property* of, the second party."

The property is then specifically enumerated, the endorsed stock is to be delivered, likewise the bonds, assignments are to be made of the judgments, and, in the case of the Marshfield land, a good and sufficient

deed of conveyance is to be executed by the trustee to the second party.

All securities, therefore, were relinquished, all pledges were given up, all title to the properties was transferred to the trustee. Graham reserved an option of purchase at a stipulated consideration, and it was only in the event of his failure to exercise the option, that the Spreckels Company was then to get title and possession of the properties involved, including the pledges, and including as well property owned and unpledged by Graham, and property which had been theretofore owned in its entirety by the Spreckels Company. The debt was gone; the relation of debtor and creditor was extinguished; there was no way in which Graham was obligated or compelled to pay the debt; the Spreckels Company had no obligation against him or compulsion upon him to the extent of a dollar.

More than that, the change of relation between the parties, as to all matters, not as to one or some, is made apparent from the scheme of releases provided by the settlement of June 8th, 1899. It was provided, not as an executory or continuing matter, but as one of the considerations, a present one, for the contract, that Graham's suit against the Beaver Hill Coal Company in Oregon should be *at once* dismissed upon the settlement of Mr. Catlin's account as receiver. It was provided, as one of the considerations of the contract, that the suit by the Beaver Hill Coal Company against Graham for an accounting, should be *at once* dismissed. It was provided as one of the considerations of the contract, that a release from

the Beaver Hill Coal Company to Graham should be executed and delivered to him *upon the signing* of the settlement contract, and it was provided, as one of the considerations of the contract, that the receivership suit by the Spreckels Company against the Coos Bay Railroad should be *at once* dismissed. It was also provided that the Coos Bay Company should execute a release to Graham. This was not provided to be executed at once, and for this obvious reason. The agreement contemplated that the Graham directors, pending the option, should be superseded by a new board, in which the Spreckels Company should have a majority, that this reorganized board should execute the release, and it was expressed in terms that the release should be executed as soon as possible—as soon as the reorganization could be effected.

And upon the 8th day of June, 1899, at the time of the settlement, Graham executes four releases to the Spreckels Company (pp. 532-533, 656-671) over and above the settlement agreement itself, and "with the purpose of carrying out the agreement with the parties entered into" (p. 534). Graham's receipt in writing for the satisfaction of judgment, delivered to him as provided in the settlement, was proved by the testimony of Mr. Moulton, of the Bank of California (pp. 645, 650, 654), and of Mr. Daniels, of the Bank of California (p. 640); and was, in effect, admitted by Graham himself, under oath, in the salary case, in which the verdict of an Oregon jury has already been referred to (p. 433). It was in this same case, that Graham filed a verified answer, August 6th, 1900,

admitting the ownership of the Spreckels Company in all the shares of the Coos Bay stock, and that answer, in the salary case, he testified was correct as he understood it at that time—August, 1900 (pp. 432-3).

Such is the settlement of June 8th, 1899—in its purpose and intent, in its express language, in all the circumstances surrounding it and giving it character. If sane men, with the aid of capable lawyers, and with the definite object of adjusting all differences, cannot make and rely upon a contract of the kind here, and if a repudiator can come into court twenty years after and insist successfully upon the repudiation, could any worse reproach to the administration of the law be conceived?

When this question was before Judge Bean on demurrer, he handed down this answer and opinion:

> "The contract of June 8th, 1899, therein set out, contains diverse and sundry provisions, and I shall not assume to state its contents in detail. In my judgment it was, as stated therein, 'for the purpose of completely adjusting all differences' between the contracting parties, and did not constitute a continuing security for the payment of a debt due the defendant Spreckels & Bros. Company from the plaintiff. The bonds and a large part of the stock now in controversy had theretofore been pledged by the plaintiff to Spreckels & Bros. Company as security for moneys advanced by them to the plaintiff to enable him to proceed with the construction of the railroad. At the time of the execution of the contract of June 8th, 1899, a suit to enforce a lien against the pledged property was pending and on trial in the courts of California. Other suits and actions were pending between the parties in the courts of Oregon and California and diverse claims were made by one against the other. The manifest purpose of the agreement was

to settle these disputes and all litigation then pending. By its terms and in pursuance thereof, the stock and bonds now in controversy were assigned and transferred by the plaintiff and Spreckels & Bros. Company to the Bank of California as trustee, to be by it delivered to the plaintiff in case he should pay to the bank for the use and benefit of Spreckels & Bros. Company, $550,000. within six months from the date of such agreement, time being made the essence of the contract, and if he failed to make such payment the bank was to transfer and deliver the stock and bonds to Spreckels & Bros. Company. The plaintiff failed to make the payment as stipulated and the stock and bonds were thereupon assigned and transferred by the Bank to Spreckels & Bros. Company and they thus obtained an absolute title thereto. I do not think the parties intended to continue the relation of debtor and creditor or that the property should thereafter be considered in any way as a continuing security for the payment of a debt due from plaintiff to Spreckels & Bros. Company. No such intention is to be found in the terms of the agreement or the circumstances surrounding it. Its whole scope and tenor precludes the theory that another mortgage or pledge was intended. The object of the suit then pending in the California court was to put an end to that relation by foreclosure and sale of the pledged property. The agreement of settlement was designed to effect that purpose by the action of the parties without the aid of the court. It was intended to dissolve the relation of debtor and creditor, and not to create or continue an equity of redemption in the plaintiff. For that purpose and to that end the parties were to and did transfer to the bank as trustee all their interests in the property now in controversy. The bank therefore became, in a sense, the agent and representative of both parties to hold the property and deliver it to the plaintiff if he complied with the terms of the agreement and made the payment within the time specified and if not, to deliver it to Spreckels & Bros. Company. The plaintiff was given an option to so acquire the property by the payment of a stipulated sum within a definite time.

> There was no obligation, however, upon his part to make such payment nor could he have been compelled to do so. It was a mere right or privilege which he could exercise or not, according to his own judgment. Time was made the essence of the contract and it was expressly stipulated that in case of the failure of the plaintiff to make the payment within the time specified the title to the property 'shall vest in and the same shall become the absolute property' of Spreckels & Bros. Company'' pp. 10-12).

We add the following, taken from Judge Bean's opinion which he handed down after trial, on final submission:

> ''In my judgment, the contract in suit was not a mortgage or pledge, nor an agreement to cut off or bar an equity of redemption, but, as stated on its face, was for the purpose of completely adjusting all differences between the parties, not only growing out of the suit then pending in California, but other suits and actions in the courts of California and Oregon, and divers claims and demands made by one against the other and the corporations in which they were mutually interested. The reasons for this conclusion are stated in memorandum heretofore filed, overruling the demurrer to the answer, and need not be elaborated'' (pp. 175-6).

Judge Bean says, also at the same place:

> ''A careful consideration of this case, in the light of the testimony, the argument of counsel, and authorities cited by them, confirms the view heretofore expressed that the contract of June 8, 1899, between plaintiff and defendant Spreckels & Bros. Company, was not a mortgage or pledge or continuing security for the payment of a debt, but was designed to, and did, put an end to the relation of debtor and creditor between them.''

II.

EVEN IF IT BE ASSUMED THAT THERE WAS A RELATION OF DEBTOR AND CREDITOR, NOTWITHSTANDING THE PLAIN TERMS OF THE AGREEMENT OF JUNE 8th, 1899, WITH AN EQUITY OF REDEMPTION, IT WAS COMPETENT TO THE PARTIES BY THAT SUBSEQUENT CONTRACT, TO PROVIDE FOR THE EXTINGUISHMENT OF THE EQUITY OF REDEMPTION, PROVIDED THE CONTRACT ITSELF WAS FAIR AND NOT OPPRESSIVE.

The agreement of June 8th, 7899, was made by and between California lawyers, representing the parties, with the law of California in their minds, and it was to be performed in California. In *Coghlan v. South Carolina Railroad Co.,* 142 U. S., pp. 109-110, it was said by the Supreme Court of the United States:

> "This court, speaking by Mr. Justice Matthews, held upon full consideration, in Pritchard v. Norton, 106 U. S. 124, 136, that the law upon which the nature, interpretation and validity of a contract depended, was that which the parties, either expressly or presumptively, incorporated into it as constituting its obligation. This doctrine was reaffirmed in Liverpool &c. Steam Co. v. Phoenix Ins. Co., 129 U. S. 397, 458, where it was said that, according to the great preponderance, if not the uniform concurrence of authority, the general rule was, 'that the nature, the obligation and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties at the time of making it have some other law in view.' The elaborate and careful review of the adjudged cases, American and English, in the two cases last cited, leaves nothing to be said upon the general subject."

Turning, now, to the law of California for "the nature, the obligation and the interpretation of the contract" we cite the decision of the Supreme Court

of California in *Watson v. Edwards,* 105 Cal. pp. 75-6. The court said:

> "A mortgagor may sell and convey all his right and interest in the mortgaged premises to the mortgagee, where the transaction is fair, honest, and without fraud, and where no unconscionable advantage has been taken of his position by the mortgagee. It would be surprising if two men in their senses and with their eyes open, could not make such a contract. The doctrine, 'once a mortgage always a mortgage', does not refer to *future* contracts. In Washburn on Real Property, it is said that the character of a mortgage cannot be changed 'by an agreement of the parties made *at the time* of the execution of the deed', and that 'equity will not admit of a mortgagor embarrassing or defeating his right to redeem the estate by any agreement which he may be induced to enter into *in order to effect a loan;*' but that 'this does not preclude any *subsequent bona fide* agreement in respect to the estate between the parties', and that 'the mortgagee may always purchase the mortgagor's right of redemption, and thus acquire an absolute title'. (2 Washburn on Real Property, 5th Ed., top pp. 65, 66, secs. 23, 24.) Section 2889 of the Civil Code does not change the rule. The case at bar is in principle exactly like the case of *Green v. Butler,* 26 Cal. 595. In that case, Justice Sawyer, speaking for the court, after noticing a number of authorities to the point, says: 'Independent of authority, no argument is necessary to show that, upon principle, a mortgagor has the same capacity to contract with reference to his interest in the mortgaged premises that he has with reference to any other property'. The only difference between that case and the one at bar is, that in the former case there was some consideration between the parties in addition to the mortgage debt; but the kind or character of the consideration can make no difference if it be, as in the case at bar, fair and adequate. There was no advantage taken of the mortgagor by the mortgagee; the latter was the reluctant party, and the transaction was pressed on him by the mortgagor."

This language reads as if it had been written for the pending case.

In *McDonald v. Huff*, 77 Cal., 280, it appeared that in 1882 John Huff was indebted to John E. McDonald, who held a mortgage upon the land in controversy, and also a judgment against Huff. It was agreed between them that Huff should convey the mortgaged land to John E. McDonald, in consideration of a release of all the indebtedness, but that the conveyance of the land should be held in escrow by R. H. McDonald till November 21st, 1882; and in case Huff paid to John E. McDonald the sum of $3080. before that date, the conveyance should be returned to Huff, but if he failed to make this payment before that date, the conveyance in escrow should be delivered to John E. McDonald, and become absolute.

November 21st, 1882, came and went, but Huff did not make the payment to John E. McDonald, and so it continued until March 16th, 1883, when R. H. McDonald delivered the deed to John E. McDonald.

Some three months after November 21st, 1882, namely, on February 13th, and February 28th, 1883, Huff made two separate and unsuccessful demands for the delivery back of the deed; but he had not made the payment; so he did not get the deed. On February 26th, 1883, Huff, notwithstanding what had happened between him and John E. McDonald, proceeded to make a second deed of the land, this time to the defendant Herrick, who had notice of all the facts.

The question was, who should prevail in title to the land, John E. McDonald under the earlier deed, or

Herrick under the later. Huff and Herrick, through their counsel, argued that "the transaction, if concluded, can only be regarded as a mortgage, and the restriction of the right of redemption is void".

What did counsel for John E. McDonald argue? Judge Garber is one of the dead men, into whose mouth Graham has put parol declarations. He makes the statement in respect to Judge Garber—as he made the statement in respect to Mr. Frohman, still living, proved to be false by Frohman himself—that Judge Garber told him the settlement of June 8th, 1899, was a mortgage. By a peculiar historical coincidence, in this case of *McDonald v. Huff*, which was decided, October 24th, 1888, 11 years before the settlement between Graham and Spreckels was made, Judge Garber was counsel for John E. McDonald, and he argued, and successfully, that

> "the mortgagee may purchase the equity of redemption by a *bona fide* sale, and the fact that he gives a privilege of repurchase—that the contract is more advantageous to the debtor—cannot render the transaction less valid".

The Supreme Court of California said:

> "The deed from the appellant Huff to respondent was, in the hands of R. H. McDonald, an escrow. And being so, it could not be revoked by the appellant. The depositary was not the agent of the vendor alone, but of both parties, and, as such, was bound to deliver the instrument on performance of the condition provided for in the contract under which he held it. Here were two written instruments, signed by the appellant Huff, one an agreement to convey on certain conditions, which was fully executed by delivery to the depositary; the other a deed, made in pursuance of the agreement, and to become operative upon the happening of the conditions set forth

> in said agreement, and its delivery by the depositary to the respondent. The first of these was binding upon the appellant, from its delivery to the depositary, without the signature of respondent, or any contract in writing from him. And the respondent, having agreed verbally to the terms of such written agreement to convey, was thereby estopped to enforce the collection of his debt until the time fixed for the payment of the money in pursuance thereof, or, in default of such payment, the delivery of the deed.
>
> "The findings of the court below show an acceptance of the deed by the attorney of the respondent, and that he by his agent and attorney, duly executed a receipt in full of all demands against the defendant Huff, and deposited the same with the depositary for his use. This shows a sufficient delivery and acceptance of the deed and release of the indebtedness."

It was accordingly held that "the title to the property in controversy vested in the respondent by the delivery of the deed to him" effective as of the date of the contract authorizing its delivery, and that Herrick, who took his deed with knowledge of the facts, obtained no title.

Bradbury v. Davenport, 120 Cal. 152, was decided by the Supreme Court of California, opinion by Mr. Justice Van Fleet, on February 23rd, 1898, little more than a year before the settlement of June 8th, 1899. The contract in this case recited that one Keniston—of whose estate, the plaintiff Bradbury was administrator, was the owner of certain land which was under mortgage to Davenport as security for a note which Keniston had made. There was due on this note $3333.87 on March 1st, 1895, and at that time Keniston and Davenport made the contract. Under this contract

Keniston deeded the mortgage premises to Davenport, but placed the deed in escrow in the hands of the cashier of a bank, and Davenport placed the note and mortgage in the same custody.

> "Said escrow was made for the purpose, and upon the condition mutually agreed, that if Keniston should pay to said cashier for the benefit of Davenport, on or before July 1st, 1895, the amount of said note, with semi-annual interest thereon at the rate of 10½ per cent per annum from the first day of March, 1895, to the time of such payment, said cashier should surrender the note and deed to Keniston, and satisfy the mortgage. But if Keniston should fail to pay the indebtedness as stipulated, then the custodian should deliver the deed to Davenport, and the note to Keniston; the stipulation being that, in that event, such delivery of said deed to Davenport shall be a full payment and satisfaction of said note."

It is true that the contract provided that notwithstanding the passing of the deed to Davenport, Keniston should have the right to remain in possession of the premises thereafter, until November 1st, 1895, but as the tenant of Davenport.

It was argued for Bradbury, as Keniston's administrator,

> "that the contract was void because it was in effect an agreement for the forfeiture of the mortgaged premises in the event of the failure to pay by July 1st, and was in restraint of the right of redemption,—in contravention of section 2889 of the Civil Code; and that the contract being void, the deed found to have been delivered in pursuance thereof, is tainted with the same vice".

The opinion of the Supreme Court of California, rejecting this contention, says:

"But, under the facts found, we are unable to perceive wherein the transaction is to be distinguished in any material respect from that sustained in *Watson v. Edwards,* 105 Cal., 70, 75, and in *McDonald v. Huff,* 77 Cal. 279; nor, in fact, why the question is not in effect concluded by what is said on the same subject on the former appeal. (*Bradbury v. Davenport,* 114 Cal. 593.)"

Referring to its own decisions, the Supreme Court continues:

"In *Watson v. Edwards, supra,* it was held that Section 2889 of the Civil Code does not affect or refer to a subsequent contract between the mortgagor and mortgagee in respect to the title to the mortgaged premises; and it is said: 'A mortgagor may sell and convey all his right and interest in the mortgaged premises to the mortgagee, where the transaction is fair, honest, and without fraud, and where no unconscionable advantage has been taken of his position by the mortgagee. It would be surprising if two men in their senses, and with their eyes open, could not make such a contract. The doctrine, once a mortgage always a mortgage, does not refer to future contracts. In Washburn on Real Property it is said that the character of a mortgage cannot be changed by an agreement of the parties made at the time of the execution of the deed, and that equity will not admit of a mortgagor embarrassing or defeating his right to redeem the estate by any agreement which he may be induced to enter into in order to effect a loan, but that this does not preclude any subsequent bona fide agreement in respect to the estate between the parties, and that the mortgagee may always purchase the mortgagor's right of redemption and thus acquire an absolute title.' (2 Washburn on Real Property, 5th ed., pp. 65, 66, secs. 23, 24.)

"And in *McDonald v. Huff, supra,* it is held that such a transaction is complete and operative and irrevocable from the delivery of the contract and deed to the

depositary, and is effectual to vest the legal title in the grantee upon the conditions of the contract being fulfilled."

The court now takes up its decision on the former appeal in this same case:

"The correctness of these principles is fully recognized," says the court, "in the opinion filed on the former appeal. That was an appeal from a judgment entered on demurrer—sustained to the complaint on the ground that it did not state a cause of action. The judgment was reversed, not because of a failure of the court to endorse the doctrine of the cases above cited, but because it was conceived that, by reason of certain averments in the complaint, the transaction was shorn of the elements *of fairness and good conscience* requisite to bring it within the rule of those cases. The complaint in this respect alleged, in effect, that the making of the contract and deed was *unfairly induced* by the representations of the mortgagee, while the mortgagor was sick and unfit to attend to business and in embarrassed circumstances; and was procured to be made *without just or adequate consideration*, in that the equity of redemption was of the value of $4000, over and above the indebtedness for which the conveyance was executed. And it was held, that the complaint stated a cause of action—that such a conveyance or release must be for a consideration which *would be deemed reasonable* if the contract were between other parties, and that any *marked inadequacy of consideration* would vitiate the transaction; and that the burden was upon the creditor to show that *the right of redemption was surrendered deliberately and for an adequate consideration.*"

Mr. Justice Van Fleet now points out that the case, after trial, and upon the findings of the court, has quite another face from that presented by the complaint. The findings show that the contract was made by Keniston fairly and deliberately, while fully competent,

and without any representations or imposition on the part of Davenport, and for an adequate consideration.

> "The supposed inequitable features presenting themselves for discussion in the former opinion," the court concludes, "are thus swept away and eliminated from the case, and what is there said on that subject is consequently wholly inapplicable to the case disclosed by the findings. This leaves the case as suggested above, squarely within the doctrine of *Watson v. Edwards, supra,* and the other cases cited."

In *Garwood v. Wheaton,* 128 Cal. 400, 404, the Supreme Court said:

> "A mortgagor may sell and convey all his right and interest in the mortgaged premises to the mortgagee, where the transaction is fair, honest, and without fraud, and where no unconscionable advantage has been taken of his position by the mortgagee. It would be surprising if two men in their senses and with their eyes open, could not make such a contract. The doctrine, 'once a mortgage, always a mortgage,' does not refer to future contracts."

The doctrine of the Supreme Court of California is also the settled doctrine of the Supreme Court of the United States.

> "A subsequent release of the equity of redemption," says the Supreme Court of the United States, (Peugh v. Davis, 96 U. S. 332, 337), "may undoubtedly be made to the mortgagee. There is nothing in the policy of the law which forbids the transfer to him of the debtor's interest. The transaction will, however, be closely scrutinized, so as to prevent any oppression of the debtor."

And at the Circuit, in the case of *DeMartin v. Phelan,* 47 Fed., p. 763, it is said instructively by Judge Hawley, late a member of this Court of Appeals:

"What is the relation of mortgagor and mortgagee? Under the law of California and most of the other states, the mortgagee takes no estate in the land, but has only a lien thereon as security for the debt until foreclosure. He can, at any time, make a *bona fide* purchase of the equity of redemption or interest of the mortgagor, and thereby acquire an absolute title to the mortgaged premises. There is no trust relation between the mortgagor and the mortgagee when unaccompanied by possession. The mortgagee does not owe the mortgagor any duty to protect the equity of redemption. There is no relation analogous to that of trustee and *cestui que trust* between the mortgagor and mortgagee created by the execution of the mortgage. No fiduciary character exists between them which prevents the mortgagor from buying the property at foreclosure sale, and holding the title thus acquired adversely to the mortgagor. The mortgagee can at all times deal with the mortgagor in respect to the property mortgaged precisely upon the same footing as any other person, and may purchase liens or claims against the property for less than their face value, and hold them against the mortgagor for the full amount. Under these general principles, which are well settled and supported by numerous authorities,—*Green v. Butler*, 26 Cal. 601; *Ten Eyck v. Craig*, 62 N. Y. 421; *Walker v. Bank*, (Del. Err. & App.) 14 Atl. Rep. 823; 6 Lawson, Rights, Rem. & Pr. Sec. 3031,—how can it consistently be claimed that the averments of the bill in this case are sufficient to maintain this action? Parties who are in poor and destitute circumstances, if they have any property, and wish to dispose of it, are often compelled by their necessities to sell their property for less than its real value; but if they obtain all that they ask for it, or voluntarily accept what is offered, and there is no fraud, deceit, oppression, improper or undue influence, or confidential relations existing between them, courts of equity have no jurisdiction, power or authority to set aside such transactions."

Judge Hawley goes on to say, further:

"There is, in most cases, a contest between the purchaser and the seller of real property; the purchaser

usually endeavoring to buy the property at the lowest price the owner is willing to take, and the owner trying to get the highest price the purchaser is willing to pay. In a certain sense, the purchaser, with ready money at his command, takes advantage of the circumstances of the owner who is poor, and by reason of his poverty is willing to sell for whatever is offered. When the parties are dealing at arm's length in the open market, and no unfair or improper measures are used, or misrepresentations made, it would be absurd to say that a court of equity, years afterwards, when the party selling had met with financial success and acquired sufficient means to repay the purchase money, could be called upon to annul the sale.

"It is only in cases where the *bona fides* of the transaction is called in question," continues Judge Hawley, "and when fraud or other like causes above enumerated are alleged, that courts of equity are authorized to interfere. In such cases, the relation of mortgagor and mortgagee is 'always a circumstance which creates suspicion, and aids in the proof of an allegation of oppression and undue advantage, where there is a gross inadequacy of price, and other circumstances tending to show fraud'. *Chapman v. Mull,* 7 Ired. Eq. 294. The authorities cited and relied upon by complainant are cases of this character. Thus, in *Peugh v. Davis*, where the action was to set aside a release of the equity of redemption, it being alleged and claimed that the money paid for the release was in fact a further loan of money, and that the release was given only as security for such loan, and the question to be determined was, as to the true character of the transaction, the court very properly said that the transaction, will be 'closely scrutinized, so as to prevent any oppression of the debtor; that a release to the mortgagee will not be inferred from equivocal circumstances and loose expressions; the release must also be for an adequate consideration; that is to say, it must be for a consideration which would be deemed reasonable if the transaction were between other parties, dealing in similar property in its vicinity—any marked under valuation of the property in the

price paid will vitiate the proceeding.' 96 U. S. 337. The same rule was applied in Villa v. Rodriguez, 12 Wall. 323, to enable the court to determine whether a deed absolute upon its face was a mortgage. In *Russell v. Southard*, 12 How. 154, the same doctrine is announced and applied to a mortgagee in possession of the property, where the question of the purchase of the equity of redemption was in dispute. The court, in the course of the opinion, indicating the necessity of confining the rule to the proper class of cases, said:

"'But strong expressions, used with reference to the particular facts under consideration, however often repeated by subsequent writers, cannot safely be taken as fixing an abstract rule. We think that, inasmuch as the mortgagee in possession may exercise an undue influence over the mortgagor, especially if the latter be in needy circumstances, the purchase by the former of the equity of redemption is to be carefully scrutinized when a fraud is charged; and that only constructive fraud or an unconscientious advantage which ought not to be retained, need be shown, to avoid such a purchase. But we are unwilling to lay down a rule which would be likely to prevent any prudent mortgagee in possession, however fair his intentions may be, from purchasing the property, by making the validity of the purchase depend on his ability afterwards to show that he paid for the property all that anyone would be willing to give. We do not deem it for the benefit of mortgagors that such a rule should exist.'

"The general principles," Judge Hawley concludes, "announced in these and other cases cited by complainant, when applied to a similar state of facts, should always be followed; but they have no application to the particular facts of this case, and cannot be considered as authority in support of the theory upon which complainant relies to sustain this action. To determine the character of the transaction, it would be unfair to confine the consideration solely to the alleged valuation of complainant's interest and the amount paid by defendant therefor. To be just to both parties, the entire transaction should be inquired into. Is it

> reasonable to believe that any other person, with knowledge of the amount of the mortgage liens, in the light of the foreclosure proceedings, the accumulated costs and interest on the money, and the limited time allowed for redemption, would have paid more than $19,000. for complainant's interests in the property? The fact that $204,000. was paid for property alleged to be worth $230,500., under such circumstances, certainly does not show such a marked undervaluation or inadequacy of price as would, of itself, shock the conscience, or raise any presumption of fraud or undue advantage that would justify a court of equity to annul the sale."

In *Lewis v. Wells,* from the District Court of Alaska, 85 Fed. 896, 899, cited by appellant, the same doctrine is recognized.

> "The right of a mortgagor," says the District Judge, "to sell the mortgaged property to the mortgagee, and give him a perfect title thereto, cannot be denied but courts of equity have always looked with suspicion upon such conveyances, and especially is this true where usury is shown to have entered into the contract, and where the consideration for the deed is wholly inadequate to the value of the property."

And in *Collins v. Denny Clay Co.,* 82 Pac. 1012, 1014, opinion by Judge Rudkin, another case cited by appellant, the rule laid down in the cases from California, and in the Supreme Court of the United States, and so fully explained in the opinion by Judge Hawley, is again recognized. Judge Rudkin says:

> "All the authorities agree that a mortgagor cannot, through any device, bargain away his right of redemption *at the time* of giving the mortgage. Bradbury v. Davenport, 114 Cal. 593; Plummer v. Ilse (just decided by this court), 82 Pac. 1009. While a mortgagor may release his equity of redemption to the mortgagee *by a subsequent* agreement, yet the courts view such agreements

> with distrust and disfavor, and, if it appear that the mortgagee has taken advantage of the necessities of the mortgagor, or that the consideration is grossly inadequate, the release will be disregarded and the original relation held to continue."

So, also, in *Ritchie v. McMullen,* another case cited by appellant, 79 Fed. 522, 557-8, it was said by Judge Taft:

> "A court of equity scrutinizes with great care the contracts made between pledgee and pledgor, as to the transfer of title to the pledgee, and does not hesitate to set aside such a contract *if* there is any ground for thinking that it is a harsh contract and one brought about by the position of vantage that the pledgee occupies with reference to the pledgor."

And so, with the other cases cited by appellant. The upshot is the same; fairly and correctly read and examined, they do not, in any sense, run counter to the settled doctrine of the California and Federal cases. A drowning man clutches at a straw. This appellant has found one case, a Kansas case, to which he makes lengthy reference. If that case can be said to sustain this appellant's contention, it is a *rara avis* indeed. It is the case of *Holden Livestock Company v. Trading Company,* 123 Pac. 734. We will look at it.

The livestock company, in June, 1901, had made a $90,000. mortgage to the Mutual Benefit Life Insurance Company, on some Kansas land. This was the first mortgage. In July following, the company—which was really owned by Howard M. Holden—made a second mortgage to Holden for $82,000. on the same land. Holden put up this second mortgage and the note

secured by it, as security with the National Bank of Kansas City, for his note to the bank of $80,000. Holden had bought some land in Missouri, borrowing some of the purchase money from this bank, and securing the bank therefor by a deed of the land, made in the name of W. H. Winants; and it was agreed that Winants should hold this deed as additional security for Holden's $80,000. note to the bank.

We now come to the year 1904. Just as Holden used the livestock company as his convenient, corporate agency,—owning it all—so the bank had a corporate agency, called the Interstate Trading Company; and in May, 1904, Holden made deeds, and had his company make them, of these two tracts of land to the Interstate Trading Company—not all of the Kansas land, however, for some of it had been sold meantime, and the proceeds had been paid in on account of what Holden owed.

We next come to 1908. In February, Holden and his company sued the bank and its Trading Company, to quiet title to the Kansas and Missouri land, and set up that these deeds had been given by way of security to the bank; asking, by way of relief, that if the court should find that the bank had been paid off, then the Holden title to the lands should be quieted; and if it should be found that there was something still owing the bank, that a decree should be made declaring that the title was held as security for such balance. The bank and the Trading Company, on their part, claimed that the deeds were absolute conveyances. That was the controversy.

It was found, as a fact, that the deeds did not stand alone; that they were made in connection with two written contracts, one of May 12th, 1904, and the other, two days later, May 14th. The contract of May 12th recited that Holden had caused to be conveyed to the Trading Company the absolute title to these lands, and had transferred to it some stocks, bonds, and notes, which had been held as collateral security for the same indebtedness; and that in consideration thereof, the Trading Company had paid Holden's note to the bank for $77,873.90, and the further sum of $6,253.30, advanced by the bank to pay taxes and interest on this $90,000. mortgage, the first mortgage in the case, which had been made to the life insurance company, and which the bank subsequently bought in. The contract of May 12th also provided that Holden, until the following November, "was to have the right to sell the property as the agent of the Trading Company for not less than the sum of the amounts named, with interest; he to retain as commission anything in excess of that sum". The Holden Company, at the same time—May 12th, that is—delivered a deed of the Kansas land to the Trading Company, and Holden himself authorized Winants to make a deed of the Missouri land to the Trading Company.

The Kansas court held that this contract contemplated an actual sale, with nothing in Holden but a right to re-purchase, within a fixed time, for a stated price; and in so holding that court used this language:

> "A mortgagor may, of course, sell the mortgaged property to the mortgagee, although the transaction will be

scrutinized closely to determine its fairness—being almost as much open to suspicion, it is said, as a purchase by a trustee from his beneficiary."

The language of Judge Hawley in the case from 47 Fed. will be profitably recalled at this point. The Kansas court goes on:

"It is also said that a conveyance of the mortgaged premises from the mortgagor to the mortgagee will be regarded as a mere change in the form of security unless it clearly and unequivocally appears that both parties intended otherwise. It may be assumed that this contract on its face contemplated an actual sale, leaving Holden with nothing but a right to re-purchase, within a fixed time, for a stated price."

But the Kansas court holds that it is the second contract, the one of May 14th, not the contract of May 12th, by which the case must be resolved.

"So far as there is any inconsistency between the two," it observes, "this contract (of May 12th) must yield to that of May 14th."

We are now told what the May 14th contract was,—as follows:

"The second contract recited that the bank had deposited with James A. Patton, an agent of the bank, Holden's note to the bank for $77,873.90, with some collateral security, and a demand note for $6,253.30, which Holden had given the bank May 12th—being for the taxes and interest on the first mortgage; that the Trading Company had deposited with Patton its note to the bank for $83,675.32, due November 9th, 1904; (the last day for Holden to re-purchase under the May 12th contract, we here interject); that Holden had deposited with Patton a bill of sale, transferring to the Trading Company the bonds, stocks and notes securing Holden's note; and deeds to the Trading Company for the Kansas land,

executed by the Holden Company, and for the Missouri land, executed by Winants.

"The provision was made," continues the court, "that *if Holden's notes were paid* by July 9th, 1904, Patton should deliver up to Holden the notes, the collateral, and the deeds; if the notes were not paid by that date, Patton should deliver the bill of sale and the deeds to the Trading Company, deliver the Trading Company's note to the bank, and surrender Holden's note to Holden. This contract *was extended several times,* the last extension expiring October 11th, 1904; but finally, delivery was made, as directed in the event the notes were not paid by the date fixed."

The Kansas court held, in substance, that this second contract amounted to a recognition of the continuing relation of debtor and creditor between the parties. We give the language of the court:

"What it in substance amounts to is this: Holden, the mortgagor, and the bank, the mortgagee, agree that Holden is to have until July 9th, *to pay his debt.*"

And again:

"If the parties, by the plan outlined in the first contract, intended to carry out an arrangement the legal effect of which would be to pass the title to the land, leaving Holden only a right for its repurchase, they are shown by the second contract not to have consummated their purpose, but to have *voluntarily abandoned* that course, and adopted one of a *radically different nature,* which made the deed—which had been signed and acknowledged but not finally delivered—in effect a mortgage. The second contract distinctly recognizes *the notes as subsisting obligations* of Holden, and the loss of his title to the land is made to turn upon whether or not they are paid by a certain date."

The court admits it to be

"a familiar and undisputed proposition, that no force will be given to a stipulation *in* a mortgage, or *in*

a deed intended as a mortgage, by which the mortgagor agreed that if he fails to make payment by a stated time, the mortgagee shall become the absolute owner of the property; it is equally well settled that no effect will be given to such an agreement made separately from the mortgage, *but at the same time.*"

And again:

"This principle renders ineffectual the deposit of a deed in escrow by the mortgagor *at the time* he gives the mortgage, for delivery to the mortgagee if he fails to meet his obligation promptly; otherwise the rule could be readily evaded."

The court further admits,

"that *after* the execution of a mortgage, the mortgagor may release to the mortgagee his equity of redemption,—using the term to denote his right to redeem after his default, or more properly, his actual title to the property, not referring to the statutory right to redeem after a sale on foreclosure;—"citing for this well understood doctrine, *11 A. & E. Encycl. of L.,* 243; 55 Am. St. 105; *3 Pom. Eq.,* Sec. 1193; *2 Jones on Mortgages,* Sec. 1045.

But, now, we are brought to an asserted distinction: It is admitted

"that the mortgagor may, *at any time after* the execution of the mortgage, sell to the mortgagee outright, all his interest in the property, and by a conveyance operating at once, and in that sense, release his right to redeem. But he cannot, even after the mortgage has been made, bind himself by an agreement that, *if he does not pay his debt by a certain time in the future, he will forfeit all right to the property.* The recognition of such a right in a few cases, of which Bradbury v. Davenport, 120 Cal. 152, is an example, seems to result from a failure to note the distinction referred to. Considerations of public policy forbid the enforcement of a contract, made by the borrower *at the inception* of his loan, that he will forfeit his interest in the property he offers as

> security, if he fails to meet his obligation promptly. The same considerations apply with equal force where he makes *a like contract* upon *a renewal of the loan*, or an *extension of the time of its payment*. To hold otherwise would be to deprive of the benefits of the rule, those most in need of its protection. If, *at any time after* the execution of the mortgage, the mortgagee could, by an extension of time, *or upon any other new consideration* obtain from the mortgagor a valid agreement that if he did not pay the debt in full by a certain date he should forfeit the entire security, then virtually the ancient common law mortgage would be still in vogue, its rigors unrelieved by any equity of redemption." (The italics are ours.)

The court now sees the Holden case for what it is. If that case, in the language just quoted from it, can be said to mean that while a mortgagee may acquire the equity of redemption by a contract made in good faith and without oppression, nevertheless the fact that, instead of taking the property outright and irrevocably, he reserves, for some stipulated time, a privilege to the mortgagor of re-acquiring the property, makes a valid contract invalid—then, it is to be said without offense intended, that such a decision should be relegated to the apocrypha. It is not sustained by an authority, state or federal, or by a respectable text writer. It is a Macedonian cry, a far cry, and a false one. We cannot think that a provision in a contract—a future contract—for the purchase of an equity of redemption, giving the mortgagee a reasonable time in which to re-acquire the property—a thing, as Judge Garber very properly argued in *Huff v. McDonald*, supra, more advantageous to the debtor—can have the effect of invalidating a transaction which would have been valid if the debtor had been denied the privilege.

In the case of *Phipps v. Munson*, 50 Conn. 268, suit had been brought for a foreclosure.

> "The parties came together and agreed upon a settlement as follows:
>
> "The plaintiff (meaning the plaintiff in the instant case, who was defendant in the foreclosure suit) was to pay the costs of the foreclosure suit and the interest due within thirty days, and was to execute and deliver to the defendant (who was the plaintiff in the foreclosure suit) a quitclaim deed releasing all his interest in and to the mortgaged premises to him; the defendant was to withdraw the suit, lease the premises to the plaintiff for a sum equal to the interest of the debt, and was to re-convey the premises to him at any time within six months from the 18th day of March, provided the plaintiff should pay to the defendant the debt, $1700., with interest."

The court found the settlement as above stated, but with the exception that the six months were to run from the 9th of March, instead of the 18th; and consequently that a tender of payment made on September 12th was not within the six months, time being of the essence. The original mortgagor filed his bill to be permitted to redeem. The court said:

> "The plaintiff claims that his prayer to be permitted to redeem should be granted, on the ground that the transaction between the parties is to be regarded in equity as a new mortgage. In support of this claim, he relies upon the familiar principle, that an absolute deed with an agreement to reconvey on the payment of a sum of money, will be treated as a mortgage. The principle itself is not controverted, but its application to this case is denied.
>
> "This, as all other contracts, must be interpreted as understood and intended by the parties. The intention of the parties when discovered must be the law of the case.

"Did the parties intend to continue in another form the relation of mortgagor and mortgagee? Such an intention is not found in terms, and we think the finding is not equivalent to it. The agreement postponed the payment of $1000. for six months, and provided that the note for $700. should be paid six months before it was due. In respect to time, therefore, Munson gained nothing but rather lost, while in other respects the risk seems to have been all on his side. At the end of six months, if the debt was not paid, he must again sue for a foreclosure or wait for the plaintiff to bring a suit to redeem. In either case, it was practically giving the plaintiff much more time than he contracted for. That is very nearly a contradiction of the plain terms of the agreement. This is a good test. Suppose the plaintiff had proposed to give a mortgage in form to secure a note payable in six months. Can we presume that Munson would have accepted it? If not, we certainly cannot presume that he intended by this agreement a mortgage simply.

"The whole tenor and scope of the agreement precludes the theory that another mortgage was intended. . The object of the suit brought by Munson was to put an end to that relation. The object of the settlement, so far as the object can be gathered from its terms and the attending circumstances, was to effect a foreclosure by the action of the parties instead of the Court. The very purpose of the deed was to destroy and not to create an equity of redemption; and of the agreement to re-convey, to give to the plaintiff, in lieu of an equity of redemption, a right to purchase for a given price within a limited time. A decree of foreclosure, at the expiration of the time limited, if the debt was not paid, would have foreclosed the equity of redemption. The expiration of the time agreed upon by the parties, the money not being paid, put an end to the right to re-purchase. The result is the same, accomplished by either method. The parties resorted to an agreement doubtless for the purpose of saving expense. In it we see nothing oppressive, and nothing that contravenes any principle of law or equity. The intention of the parties seems to be plain on the face of the transaction, and as we entertain no doubt in

respect to it, we have no occasion to resort to artificial or technical rules of construction for the purpose of construing the agreement."

And in Adams v. Adams, 51 Conn. 546, the court said:

"As between the grantor and grantee, a court of equity will treat a deed, absolute on its face, as a mortgage, where it appears, expressly or by implication, that such was the intention of the parties. The reason for this is, that the court will give effect to the real contract between the parties, where the contract is legal and is not contrary to the policy of the law. But when the transaction on its face does not purport to be a mortgage, and it expressly appears that the parties intended that it should not be a mortgage, the court cannot treat it as such any more than it can make a contract for the parties.

"Mrs. Adams held a mortgage on the land in question; the plaintiff applied for a further loan, offering as security an additional mortgage upon the same property. This she declined, but proposed to purchase the plaintiff's interest in the property. The plaintiff assented to that proposition, and thereupon executed and delivered a deed of the property, and Mrs. Adams surrendered the note secured by an existing mortgage. The plaintiff, however, was told that he could have his land again upon paying the note and the money paid, at any time within six months. The court below correctly regarded this transaction, just as the parties did, not as a mortgage to secure a loan, but as a sale, with an option in the plaintiff to re-purchase at any time within six months."

The Holden case makes a reference to *White & Tudor's Leading Cases in Equity,* misleading because partial and incomplete. It quotes a sentence and then stops. This is the sentence:

"The maxim, once a mortgage always a mortgage, does not cease to be applicable on the execution of the instrument, and will, on the contrary, invalidate a subsequent

agreement tending to preclude the exercise of the right of redemption."

White & Tudor's L. C. in Eq., Vol. II, Pt. II, p. 984.

In speaking, in this sentence of "a subsequent agreement", the learned annotators are pointing, not to the proposition that an equity of redemption may not be validly contracted away by a subsequent agreement, but to the point that such agreement must be a fair one. This appears from their next sentence, which we quote:

"The burden is, therefore, on the mortgagee to show that a sale or release of the mortgagor's equity was made deliberately and for an adequate consideration."

And again, at the next page, they say:

"There is, however, no rule or policy that precludes the mortgagee from entering into an agreement with the mortgagor for the purchase of the land, or even from taking it in satisfaction of the debt, and a court of equity will not, therefore, set aside a release of the equity of redemption, where it appears to have been freely made and for an adequate consideration" (citing cases from Alabama, Massachusetts, Maryland, New York, Illinois).

The Holden case aso cites Batty v. Snook, 5 Mich. 231, quoting this language:

"The mortgagor may release the equity of redemption to the mortgagee for a good and valuable consideration, when done voluntarily, and there is no fraud and no undue influence brought to bear upon him for that purpose by the creditor."

The next sentence of the Michigan opinion is then quoted as follows:

> "But it cannot be done by a contemporaneous or *subsequent* executory contract, by which the equity of redemption is to be forfeited if the mortgage debt is not paid on the day stated in such contract, without an abandonment by the court of those equitable principles it has ever acted on in relieving against penalties and forfeitures."

We have italicized the word "subsequent", in the above excerpt. No explanation is made, in the Holden case for the use of that word by the Michigan court. The Holden opinion makes the excerpt, and that is all. We think an explanation, drawn from its own opinion, is due the Michigan court, and we proceed to make it.

The fact is, that in the Michigan case a partial settlement of some old indebtedness, secured and unsecured, had been made, leaving a balance due and outstanding of $2000.

Thereupon, the man who still owed the $2000., deeded back to the creditor, some land which the creditor had previously sold him, and a lien upon which had been cancelled in the settlement. The subsequent contract spoken of in the opinion was, literally, subsequent to this deed to the creditor, but it was only one day subsequent, and the court treated the two instruments, deed and contract, as practically, one instrument, and held that the deed was intended as a mortgage to secure the balance of $2000., and that the equity of redemption could not be cut off by a contemporaneous paper.

"To allow," said the Michigan Court,

> "the equity of redemption to be cut off by a forfeiture of it in a separate contract, would be a revival of the common law doctrine, using for that purpose two instruments, instead of one, to effect the object."

Finally, as a last word for the Holden case, it appears that the Kansas court, regardless of the legal effect of the writings, determined that the bank was precluded, by an equitable estoppel, to deny Holden the privilege of redemption. We point, now, to the language of the opinion:

> "We agree with the referee and the trial court that, *whatever may have been the legal effect of the writings* entered into by the parties, their *subsequent conduct* was such as *to preclude the defendants from denying to the plaintiffs a right to redeem the property.* It was worth at the time of the contract $60,000. above the liens against it. Holden continued to negotiate sales of parts of it, incurring considerable trouble and expense. Commissions were paid by the bank to him, but he turned them over to the agents who had made the sales. With the consent of the bank, he retained in two instances a part of the proceeds. In order to carry through one sale, he included an unincumbered tract of his own. The bank kept what it called the 'Holden Collateral Account', in which record was made of the amounts received and disbursed in connection with the property referred to. This, however, was a matter of convenience and in accordance with its usual plan of carrying real estate assets. At the request of the federal banking officials, a deed was made by the Trading Company to the bank in the early spring of 1905. Holden expended considerable sums in permanent improvements on the property. No acounting was had or asked by the bank concerning these expenditures or the rent account for three years. As the sales of part of the Kansas lands were made, the bank executed partial releases of the mortgage given by the Holden Company to Holden, and by him transferred to the bank; the releases reciting that the mortgage was still in force. We think that, *upon any theory of the effect of the contracts,* the bank must be deemed to have permitted Holden to act upon the assumption that he was to have the benefit of his exertions, and was to own the property whenever the bank had received the amount of its claims, with interest and expenses. Having allowed

> Holden to act upon this conception of his rights, the bank cannot deny him the privilege of redemption."

It is said by appellant that the doctrine of the Holden case, whatever doctrine may be meant, is re-affirmed in *Marshall v. Russell,* decided by the Supreme Court of Colorado, 158 Pac. 141, 142. The Colorado case simply affirms the fundamental rule that an equity of redemption may be parted with by the execution of a subsequent agreement, based upon valuable considerations. In that case, a deed had been given by Hurlbert to Smith, as a mortgage to secure an indebtedness. Speaking of this deed the court said:

> "The deed when executed, being simply a mortgage for the security of a debt, could not thereafter become anything else, except through the execution of a *subsequent* agreement based upon a valuable consideration. Such was not done, for which reason the cases cited by the plaintiff in error are not applicable; but, to the contrary, not only were these instruments, when executed, given as security for this debt, but they were thus treated by the parties to them, not only at the time of their execution and delivery, but thereafter."

In conclusion upon this point, we beg to repeat what Judge Bean said of the settlement of June 8, 1899:

> "Its whole scope and tenor preclude the theory that another mortgage or pledge was intended. The object of the suit then pending in the California court was to put an end to that relation by foreclosure and sale of the pledged property. The agreement of settlement was designed to effect that purpose by the action of the parties without the aid of the court. It was intended to dissolve the relation of debtor and creditor, and not to create or continue an equity of redemption in the plaintiff. For that purpose and to that end the parties were to, and did transfer to the bank as trustee all their

interest in the property now in controversy. The bank therefore became in a sense the agent and representative of both parties (*cf. Bury v. Young,* 98 Cal. 451—interjection ours) to hold the property and deliver it to the plaintiff if he complied with the terms of the agreement and made the payment within the time specified, and if not to deliver it to Spreckels & Bros. Company. The plaintiff was given an option to so acquire the property by the payment of a stipulated sum within a definite time. There was no obligation, however, upon his part to make such payment, nor could he have been compelled to do so. It was a mere right or privilege which he could exercise according to his own judgment. Time was made the essence of the contract, and it was expressly stipulated that in the case of the failure of the plaintiff to make the payment within the time specified, the title to the property 'shall vest in and the same shall become the absolute property' of Spreckels & Bros. Company.''

III.

ASSUMING FOR ARGUMENT'S SAKE—AGAINST THE FACTS AND THE LAW—THAT GRAHAM HAD A RIGHT OF REDEMPTION, EQUITY WILL NOT PERMIT A REDEMPTION WHERE IT WOULD BE INEQUITABLE TO DO SO.

Over and above the advances for the railroad, represented by the note in the foreclosure case, the Spreckels Company, on going into possession under the settlement, in December, 1899, and finding the road in a condition almost ruinous (p. 566), expended thereafter, and prior to 1907, when Graham filed his first complaint in this case, a sum for rehabilitation and upkeep and betterment, approximating $200,000.—bringing the advances to the amount of $728,947. (p. 595). Graham stood by for years, and permitted this expendi-

ture to go on, without taking a step in assertion of adversary right—taking no step until he filed the complaint of 1907. In January, 1900, in the suit which the Spreckels Company was forced to bring, in order to have its stock registered, and to get an accounting from Graham, it was expressly notified to him, as a party defendant, that the Spreckels Company claimed the ownership of the railroad stock and bonds. In the suit by the Farmers' Loan and Trust Company to foreclose on those bonds, he was again notified—he was an intervenor in the case—of the Spreckels Company's claim of ownership to the stock and bonds. On the 8th of February, 1905, he stipulated for judgment against him in those cases; and on the same day he wrote to A. B. Spreckels the letter which we have quoted, and in which he declares that the only unadjusted matter then was, the matter of the life insurance policy, and even as to that, it was for the Spreckels Company, in justice to itself, to say upon what terms it should be dealt with. Upon the record in this case, if any right of redemption can be fetched from far, we have all the elements of estoppel, waiver and abandonment. A court of equity, in these circumstances, would not tolerate a redemption.

Marshall v. Williams, 21 Or., pp. 271-2;
West v. Reed, 55 Ill., pp. 245-6;
Chapman v. Bank of Cal., 97 Cal. 155;
Creamery Co. v. Sharples, 71 S. W. 1068;
Hall v. Eccles, 65 N. W. 1052;
Chouteau v. Iron Works, 7 S. W. 467;
McKenna v. McKenna, 118 Ill. App. 240.

IV.

THE QUESTION OF LACHES.

Graham did not file his original complaint until December, 1907. It was at law, in conversion. Eight years after, he sets up a new cause of action, what is called in his brief, a bill to redeem. This was to set up a new cause of action against which laches are to be computed as of the time of the filing of the amended complaint in January, 1916 *(Whalen v. Gordon,* 95 Fed. 305; *Galesburg v. Hart,* 221 Fed. 7). In the case at bar we find the slothful commencement of an inequitable case, its slothful prosecution, and, meantime, one important witness after another entered upon the roll call of death. Such laches do not invite the interposition of a court of equity.

Chapman v. Bank of Cal., 97 Cal. 155;
Drees v. Waldron, 212 Fed. 93;
Weniger v. Mining Co., 227 Fed. 548.

V.

THE STATUTE OF LIMITATIONS.

1. On the assumption that the Spreckels Company was still in relation to Graham as a pledgee, there was an unequivocal repudiation of the same, at least as early as January, 1900, when the Spreckels Company brought suit against the Coos Bay Railroad Company and Graham, alleging in the complaint that it was the absolute owner of the stock and bonds in question.

Jones on Collateral Securities, 3d Ed., sec. 583;
Gilmer v. Morris, 43 Fed. 456;

University v. National Bank, 3 S. E. 359;
Chapin v. Freeland, 142 Mass. 383;
Shelby v. Guy, 24 U. S. 361;
Campbell v. Holt, 115 U. S. 625.

2. Since the cause of action, in this view, arose in California, and plaintiff and defendant were non-residents of Oregon, the action to redeem was barred in three years from January, 1900, under Subdivision 3 of Section 338, of the California Code of Civil Procedure (see Lord's Oregon Laws, Section 26, providing that the California Statute of Limitations governs under the circumstances). Graham alleges in his complaint that he was both a citizen and resident of Great Britain. And it appears without contradiction that he has not been a resident of Oregon since December 18th, 1899 (p. 565).

3. If the Spreckels Company is to be charged with having appropriated to itself in December, 1899, the properties in question, without Graham's consent, and unlawfully, and with holding them as a constructive trustee *(Chapman v. Bank of California,* 97 Cal. 155), the statute of limitations would begin to run as of that time *(Norton v. Bassett,* 154 Cal. 411); and the cause of action became barred, in four years thereafter, under Section 343 of the Code of Civil Procedure of California *(Hecht v. Slaney,* 72 Cal. 366).

CONCLUSION.

An apology is due the court for the length to which this brief has been drawn out. We may be indulged,

however, in the hope that the labors of the court will be made less heavy by the full and ample references, which we have sought to make, to the record in the case, and to the authorities cited. It has been difficult to deal with the case in brief compass. The transactions went much into detail, there was much documentary evidence, and the claim made is belated, audacious, and exasperating. The amount of the railroad advances with interest, is $1,088,178.04. This is increased to $1,288,178.04 by expenditures made upon this railroad after the Spreckels Company took possession under the settlement. Of the $1,300,000. which the Southern Pacific Company paid, and of which, commissions allowed for, the Spreckels Company received approximately a million dollars, part only is attributable to the properties in question here, namely, $650,000.—leaving a balance on railroad account of over half a million dollars. The net result to the Spreckels Company of its dealings with Graham, is thus expressed by Mr. Samuels:

> "We had actually invested at the time of the sale to the Southern Pacific Railroad Company, $1,947,350.20. We got $1,000,000. We bid the nine hundred and fifty-nine thousand dollars good-bye" (pp. 595-6).

It is now respectfully submitted that the judgment and decree of the District Court should be affirmed.

Dated, San Francisco,
February 14, 1917.

Morrison, Dunne & Brobeck,
Fenton, Dey, Hampson & Fenton,
Attorneys for Appellees.

APPENDIX.

This agreement, made this 8th day of June, 1899, by and between R. A. Graham, party of the first part, and J. D. Spreckels & Bros. Company, a corporation, party of the second part,

WITNESSETH

That the parties hereto, for the purpose of completely adjusting all matters of difference between themselves, and between each of them and the Beaver Hill Coal Company, a corporation, and the Coos Bay, Roseburg & Eastern Railroad & Navigation Company, a corporation, do hereby agree as follows:

1. That the receivership suit brought by the first party against said Beaver Hill Coal Company, and now pending in the Circuit Court of the United States for the District of Oregon, shall at once be dismissed upon the settlement of the account of W. W. Catlin, receiver of said Company, each party to said suit to bear his own costs; that an order be at once made in said suit directing said receiver to render an account to said court, and that upon the settlement of said account an order be made removing said receiver; that all proper fees, costs and charges of said receiver and of J. B. Hassett, the former receiver, and all proper certificates issued by said Hassett and said Catlin as said receivers, be paid as far as possible out of the funds in the hands of said Catlin, as said receiver when the same are allowed by the said court; that said receiver shall surrender the possession and custody of

all the property of said Beaver Hill Coal Company unto said company; that said company shall remain in the possession of all its said property during the life of this agreement, without interference in any manner by the first party; that the second party will cause proper steps to be taken by the Beaver Hill Coal Company, so long as it controls the same, for the care and preservation of said property during the life of this agreement; and that the moneys received by said company after the removal of said receiver shall be applied towards the payment of the balance, if any, remaining due for said fees, costs and charges of said Hassett and Catlin, as said receivers, and on said certificates of said receivers, and also towards the payment of all proper expenses incurred in the care and preservation of the property of said company after the removal of said Catlin, as said receiver, and during the life of this agreement.

2. That the suit brought by said Beaver Hill Coal Company against the first party for an accounting, now pending in the Superior Court of the City and County of San Francisco, State of California, shall be at once dismissed, each party thereto to bear his own costs, and that there shall be delivered to the first party, upon the signing of this agreement, a release executed by said Beaver Hill Coal Company, releasing and discharging the first party of and from any and all claims and demands which it may now have or claim to have against him.

3. That the receivership suit brought by the second party against the Coos Bay, Roseburg & Eastern Rail-

road & Navigation Company now pending in said Circuit Court of the United States, for the District of Oregon, shall be at once dismissed, each party thereto to bear his own costs.

4. That a judgment shall be at once entered in the suit brought by the second party against the first party, now pending in said Superior Court of the City and County of San Francisco, State of California, (Department No. 3 thereof), numbered 64,541, in favor of the second party and against the first party for the sum of $523,162.52 together with interest thereon at the rate of six per cent per annum from the 1st day of April, 1898, both in United States gold coin and providing for a sale of the pledged securities sought to be foreclosed in said suit, and with the usual provisions for the docketing of a judgment against the first party for any deficiency which may exist after the sale of the collaterals specified in the original complaint in said suit; that all proceedings to enforce said judgment be stayed for the period of six months after the date of this agreement.

5. That the parties hereto hereby designate and appoint the Bank of California a corporation, as trustee for them, to hold the properties and written instruments hereinafter mentioned for the purposes hereinafter set forth, and to perform the duties hereinafter prescribed.

6. That the first party shall deliver to said trustee:

a. All of the shares of the capital stock of said Coos Bay, Roseburg & Eastern Railroad and Navigation Company in excess of the 10,001 shares thereof now held by the second party, certificates therefor to be properly

endorsed, excepting seven shares thereof to be issued to the directors of said Company as hereinafter provided.

b. The resignations of all of the directors of said Company now in office, the same to take effect upon the election of the directors hereinafter named.

c. A release executed by the first party releasing and discharging the said Beaver Hill Coal Company of and from any and all claims and demands which he may now have or claim to have against said company, said release not to take effect, however, except upon the failure of the first party to pay or cause to be paid to said trustee, for the use and benefit of the second party, the sum of $550,000.00 gold coin of the United States, as hereinafter provided.

d. A release executed by the first party releasing and discharging the said Coos Bay, Roseburg & Eastern Railroad & Navigation Company of and from any and all claims and demands which he may now have or claim to have against said Company; also a disclaimer of all right, title or interest in or to any of the property of said Company including the equipments and rolling stock of the railroad, and the spur tracks to the mine of the Beaver Hill Coal Company, and to the mine of the Beaver Coal Company, the same being known as the "Klondike Mine", said release and disclaimer not to take effect, however, except upon the failure of the first party to pay or cause to be paid to said trustee, for the use and benefit of the second party, said sum of $550,000.00 gold coin of the United States, as hereinafter provided.

That the second party shall deliver to said trustee:

a. The certificate for the 10,001 shares of the capital stock of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company heretofore pledged to the second party by the first party, said certificate to be properly endorsed by the second party.

b. All of the bonds of the said Coos Bay, Roseburg & Eastern Railroad & Navigation Company heretofore pledged by the first party to the second party, and now in its hands, of the par value of $620,000.00.

c. Assignments, in proper form, to said trustee, of all judgments of record which have been rendered in the courts of Coos County, in the State of Oregon, in favor of the second party, and are now held by it as collateral security for the payment of moneys owing to it by the first party.

d. All of the shares of the capital stock of said Beaver Hill Coal Company, excepting one share thereof to be issued to each one of the present directors of said Company, but said shares of stock issued to said directors shall be duly endorsed and delivered by them to said trustee as soon as possible hereafter, the same to be then held by said trustee together with the other shares of said stock for the uses and purposes hereinafter set forth.

e. A satisfaction, in proper form, and duly acknowledged of said judgment entered in said suit mentioned in paragraph number four of this agreement.

That the first and second parties shall jointly execute and deliver to said trustee a deed to the following-

described property situate in the Town of Marshfield, in Coos County, Oregon, sufficient in form and substance to vest the title thereto in said trustee, to wit:

All of blocks numbered one (1), two (2), six (6), eight (8), sixteen (16), twenty-one (21), twenty-eight (28), thirty-three (33), thirty-four (34), thirty-five (35), thirty-six (36), thirty-seven (37), forty-six (46), forty-seven (47), forty-eight (48), forty-nine (49), fifty-two (52), fifty-three (53), fifty-four (54), fifty-seven (57), fifty-nine (59), sixty-three (63), sixty-six (66), sixty-seven (67), seventy (70), seventy-one (71), seventy-five (75), seventy-seven (77), eighty (80), eighty-one (81), eighty-four (84), eighty-five (85), also block lettered "C", also lots one (1) and two (2) and lots eight (8) to forty (40) inclusive, in block numbered fifty-six (56), in "Railroad Addition to Marshfield", according to the plat of said Addition made by G. H. Spencer, and duly recorded in the office of the County Recorder of said Coos County, Oregon.

7. That there shall be transferred and issued to each of the following named persons, to wit: William L. Pierce, Frederick S. Samuels, W. S. Chandler, S. H. Hazard, R. A. Graham, J. W. Bennett and T. R. Sheridan, one share of the capital stock of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company, which said shares of stock shall be duly endorsed and delivered by them to said trustee as soon as possible hereafter, the same to be then held by said trustee together with the other shares of said stock for the uses and purposes hereinafter set forth. That a meeting of the directors of said

Company shall be called for the reorganization of the Board of Directors of said Company, and at said meeting the persons above named shall be elected to serve as directors of said Company during the life of this agreement, and until their successors are elected and qualified. Upon their election, as such directors, there shall be signed by each of said parties a written resignation of his said office as director, the same to be then delivered to said trustee; such resignations not to take effect, however, except as hereinafter provided.

8. The first party shall remain as manager of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company during the life of this agreement, and subject to the terms hereof. At all times during the life of this agreement the second party shall be entitled to have a representative in the County of Coos, State of Oregon, who shall be permitted at all times, upon demand, to inspect all books, papers and vouchers of every kind connected with the business of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company. Said Company shall be operated during the life of this agreement as a railroad corporation and common carrier of passengers and freight for hire, and shall not be used to further the personal purposes or enterprises of any individual in any manner which will not be to the best interests of said Company, and shall offer no special advantages in freights or fares, rebates or credits to any individual not granted to the community by general tariff and regulation. It is agreed that the rate of forty cents per ton hereto-

fore fixed for the transportation of the coal of the Beaver Coal Company over said railroad shall not be changed during the life of this agreement.

9. That if, at any time within six months from the date of this agreement, the first party shall pay or cause to be paid to the said trustee, for the use and benefit of the second party, the sum of $550,000.00 in gold coin of the United States, the title to all of the shares of stock, bonds, real property and judgments below mentioned shall thereupon vest in, and the same shall become the absolute property of the first party; and said trustee is hereby authorized and directed to thereupon deliver to the first party, and the second party hereby obligates itself to cause to be thereupon delivered to him——

a. All of the capital stock of said Beaver Hill Coal Company placed in the hands of said trustee, and all of the shares thereof issued to said directors of said Company, all duly endorsed.

b. All of the capital stock of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, placed in the hands of said trustee, and all of the bonds of said Company placed in the hands of said trustee.

c. A good and sufficient deed of conveyance executed by said trustee to the first party, of the above described real property in said town of Marshfield.

d. Assignments, in proper form, executed by said trustee to the first party, of all said judgments in favor of the second party assigned by it to said trustee, as hereinabove provided, or, if said judg-

ments, or any of them, have been collected by said trustee, then to pay over the moneys collected thereon to the first party.

e. Said satisfaction of said judgment entered in said suit mentioned in paragraph number four of this agreement.

f. The resignations of the following directors of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, to wit: William L. Pierce, Frederick S. Samuels, W. S. Chandler and S. H. Hazard, said resignations to then take effect.

g. Said release executed by the first party in favor of said Beaver Hill Coal Company, and said release and disclaimer of the first party in favor of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company.

And said trustee shall at the same time deliver to the second party said sum of $550,000.00, in gold coin of the United States.

Said payment of said sum of $550,000. in gold coin of the United States to said trustee, for the use and benefit of the second party, shall operate as a full settlement, satisfaction and discharge of all claims and demands of every kind and nature whatsoever now existing in favor of either party hereto against the other; and of all claims and demands of every kind and nature whatsoever now existing in favor of the second party against said Beaver Hill Coal Company and said Coos Bay, Roseburg & Eastern Railroad & Navigation Company.

The second party further agrees that it will, upon demand of the first party at any time after the payment of said sum of $550,000. to said trustee, execute a proper consent in writing to the cancellation of that certain order heretofore given by said Coos Bay, Roseburg & Eastern Railroad & Navigation Company to the Farmers Loan & Trust Company, directing the delivery by said Farmers Loan & Trust Company to the second party of the bonds of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, as they may be issued from time to time.

10. Should the first party fail to pay or cause to be paid to the said trustee for the use and benefit of the second party, within said six months from the date hereof, said sum of $550,000.00, in gold coin of the United States, the title to all of the shares of stock, bonds, real property and judgments above mentioned shall, at the expiration of said six months, vest in and the same shall become the absolute property of the second party; and said trustee is hereby authorized and directed to thereupon deliver to the second party——

a. All of the capital stock of said Beaver Hill Coal Company placed in the hands of said trustee, duly endorsed.

b. All of the capital stock of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company placed in the hands of said trustee, and all of the bonds of said Company placed in the hands of said trustee.

c. A good and sufficient deed of conveyance executed by said trustee to the second party of the above described real property in said town of Marshfield.

d. Assignments, in proper form, executed by said trustee, to the second party of all said judgments in favor of the second party assigned by it to said trustee, as hereinabove provided, or, if said judgments, or any of them, have been collected by said trustee, then to pay over the moneys collected thereon to the second party.

e. The resignations of the following directors of the said Coos Bay, Roseburg & Eastern Railroad & Navigation Company, to wit: R. A. Graham, T. R. Sheridan and J. W. Bennett, said resignations to then take effect:

f. Said release executed by the first party in favor of said Beaver Hill Coal Company, and said release and disclaimer of the first party in favor of said Coos Bay, Roseburg & Eastern Railroad & Navigation Company.

And said trustee shall at the same time deliver to the first party said satisfaction of said judgment entered in said suit mentioned in paragraph number four of this agreement; and the second party shall cause said Coos Bay, Roseburg & Eastern Railroad & Navigation Company to execute and deliver to the first party a release and discharge of any and all claims and demands which it may have or claim to have against the first party. And all matters and things in dispute between the parties hereto, or between the first party and said Beaver Hill Coal Company and said Coos

Bay, Roseburg & Eastern Railroad & Navigation Company, and all claims and demands shall be and become, by virtue hereof, finally and forever settled and determined.

11. Upon the performance by said trustee of the acts hereinabove provided to be done by it, said trust shall cease and determine.

12. The second party further agrees to cause to be executed and delivered by said Beaver Hill Coal Company to said T. R. Sheridan, of Roseburg, Oregon, upon the execution of this agreement, a quit-claim deed to the northeast quarter of section nineteen, township twenty-seven south of range thirteen west of the Willamette Meridian; also to cause to be executed and delivered by A. B. Spreckels, (the vice-president of the second party), to the trustee hereunder, upon the execution hereof, an agreement whereby the first party shall be given the option and right to purchase from said A. B. Spreckels all his right, title and interest in and to that certain real property in said Coos County, Oregon, known as and called the "Chadwick Tract", upon the payment by the first party to said A. B. Spreckels of the sum of money paid by said A. B. Spreckels for said right, title and interest in and to said property, together with interest thereon at the rate of six per cent per annum, said agreement for said option not to take effect, however, except in the event that the first party shall pay said sum of $550,000.00 to said trustee for the use and benefit of the second party within said six months from the date hereof, as hereinabove provided.

13. The second party further agrees that it will redeliver to the first party that certain policy of life insurance issued to the first party by the New York Life Insurance Company, numbered 664,673, and now held by the second party together with a waiver by it of all claim to or interest in said policy, upon the payment to it by the first party of the sum of $2950.00, at any time during the life of this agreement.

14. It is mutually agreed that time shall be of the essence of this agreement and that this agreement shall inure to the benefit of and shall bind the heirs, executors, administrators, successors or assigns of the respective parties hereto.

In witness whereof, the first party has hereunto set his hand and the second party has caused its corporate name and seal to be hereunto affixed by its President and Secretary, the day and year first above written.

Done in duplicate.

R. A. Graham.
J. D. Speckels & Bros. Company.
By John D. Spreckels,
Its President
Chas. A. Hug,
Its Secretary.
(Seal)

Witnesses to signature of R. A. Graham:
Isaac Frohman.
E. F. Preston.

We hereby accept the foregoing trust.

The Bank of California.
S. P. Smith,
By Clay.